# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1964

## No. 69

RONALD L. FREEDMAN, APPELLANT,

*vs.*

MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

FILED MAY 8, 1964
PROBABLE JURISDICTION NOTED JUNE 22, 1964

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1964**

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## INDEX



RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 21, 1964

[fol. A]

**IN THE**

**CRIMINAL COURT OF BALTIMORE, MARYLAND**

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STATE OF MARYLAND,

vs.

RONALD L. FREEDMAN.

---

INDICTMENT—Filed December 18, 1962

State of Maryland,
City of Baltimore, to wit:

The Jurors of the State of Maryland, for the body of the City of Baltimore do on their oath present that Ronald L. Freedman late of said City, on the first day of November, in the year of our Lord nineteen hundred and sixty-two, at the City aforesaid unlawfully did show and exhibit, or cause to be shown and exhibited, at a certain motion picture theatre, there situate to wit; Rex Theatre, York Road and Cold Spring Lane, in said City, a certain motion picture film, to wit, "Revenge at Daybreak", as owner or lessee of said film, without having first submitted for approval and license, by the Maryland State Board of Censors; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

William J. O'Donnell, The State's Attorney for the City of Baltimore.

[fol. B]

R. E. Whiteford & Felix Bilgrey

2/8/63 Post S.

4273

STATE OF MARYLAND,

vs.

RONALD L. FREEDMAN. B

(W) 29

3/18—Not concluded

3/19—Not concluded & held S.C.

Indictment

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(True Bill)

L. A. Schneider, Foreman.

Filed

3/18/63 P NG T C

Sub Curia as to Verdict—Sodaro

5/24/63 G Fined $25 & Costs

Sodaro, J.

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Witnesses

5/24/63

Written opinion by Judge Sodaro filed

Eva M. Holland

Off. Gallagher

Off. Cacano NE

5/24/63

Traverser released on his own recognizance pending an appeal to the Court of Appeals.

A. S.

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Violation of Art. 66-A
Sec. 2

O. K. of the Annot Code of Maryland

Copy of Indictment Served

Receipt Filed. PH

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Posted to Costs Record

Date 6/25/63 By E. Robinson

Page Number 121

| | |
|---|---|
| Fine | $25.00 |
| States Attorney | 5.00 |
| Clerk | 9.25 |
| Sheriff | 23.00 |
| Attorney | 5.00 |
| Total | $67.25 |

63
2316
166

Ronald L. Freedman
3501 St. Paul St.
Own recog

—100

5/24/63

[fol. 2]

IN THE CRIMINAL COURT OF BALTIMORE

A

STATE OF MARYLAND

VS.

RONALD FREEDMAN

Indictment #4273/62

**Transcript of Proceedings—March 18, 1963**

Baltimore, Maryland

Before Honorable Anselm Sodaro, J.

APPEARANCES:

Messrs. Robert T. Freeze and Robert Lazzaro, on behalf of the State.

Messrs. Richard Whiteford and Felix J. Bilgrey, on behalf of the Defendant.

The Clerk: Ronald Freedman. Ronald Freedman, under Indictment #4273 The State of Maryland charges you with violation of Article 66 A, Section 2. At the time of your arraignment on December 26, 1962 you pleaded not guilty. What is your plea today?

[fol. 3] Mr. Whiteford: Not guilty, court trial.

Mr. Freeze: The Defense wishes to make an opening statement, sir.

Mr. Whiteford: Your Honor, the defendant in court today is Mr. Ronald Freedman. Mr. Freedman is the licensee and the exhibitor of films at the Rex Theatre.

Mr. Freedman is in court today charged with the violation of Article 66 of the Annotated Code of Maryland. This is the Maryland Motion Picture Censorship Act. And the State purports to have the right under this act to restrain the right of Mr. Freedman to exercise his Constitutional freedoms of speech and press. It is the belief of

Mr. Freedman and myself that the Censorship Act is an oppressive act that is unconstitutional under both the Federal and State Constitutions; and, that it should not be enforced. It is our purpose in coming to court today to have a judicial determination as to the invalidity of this act.

I have seated at my right Mr. Felix Bilgrey. Mr. Bilgrey is a member of the Bar of New York City. It has been his privilege over the years to be associated in many motion [fol. 4] picture censorship cases. He has been before our courts in past years, both before the courts in Baltimore City, and the Maryland Court of Appeals.

I would like to move at this time for his admission for the purpose of trying this case with me.

The Court: Very well. Mr. Bilgrey, very happy to grant the motion, very happy to have you here and to take advantage of your talents.

Mr. Bilgrey: Thank you very much, Your Honor. I feel very privileged of being allowed to participate in this action, especially since I feel it involves an important issue of Constitutional law, namely, validity of the censorship of motion pictures in this State. And, I think that the word censorship itself is a word which is so rarely employed, which is so unusual to our form of life, that it gives me double privilege indeed to be able to participate in these proceedings.

The Court: Very glad to have you.

Mr. Bilgrey: Thank you.

### Offer in Evidence

Mr. Freeze: If Your Honor please, there is a stipulation [fol. 5] by the State and Counsel for the Defendant which we will offer as Exhibit Number 1.

If it please The Court, it is stipulated and agreed by and between Ronald L. Freedman, the defendant, Richard C. Whiteford and Felix Bilgrey, his attorneys, and Robert Freeze, assistant state's attorney of Baltimore City, in the above matter: (1) on or about November 1st, 1962, the motion picture "Revenge at Daybreak" was exhibited at the Rex Theater on York Road, near Cold Spring Lane, in the City of Balitmore. (2) That Ronald Freedman is the

lessee of the Rex Theater and was exhibitor of "Revenge at Daybreak". (3) That the film "Revenge at Daybreak" was exhibited without ever having been submitted for approval for licensing to the Maryland State Board of Censors. (4) That the film "Revenge at Daybreak" has never been submitted for approval and licensing to the Maryland State Board of Censors. (5) That the film "Revenge at Daybreak" is submitted herewith as Agreed Exhibit 1, we will make that exhibit 2, the film is the identical film that was exhibited on or about November 1st, 1962. (6) The Rex [fol. 6] Theater is a commercial movie house, operating in Baltimore City as a business enterprise and admissions were charged to the general public for admission to the theatre when the film Revenge at Daybreak was exhibited. (7) That the film Revenge at Daybreak was licensed for exhibition pursuant to a regular licensing agreement by and between the Times Film Corporation as distributor and Baltimore Film Society Incorporated and Ronald L. Freedman, as Licensees. Attached hereto and incorporated herewith is a copy of the licensing agreement between the aforesaid parties.

We will offer, then, the stipulation and the agreement as State's Exhibit Number 1 and 1 A, if it please The Court, for the record we will offer the film as State's Exhibit Number 2.

(Thereupon the afore-mentioned stipulation and agreement were marked State's Exhibit Number 1 and 1 A; the film was marked State's Exhibit Number 2.)

Miss Eva M. Holland, please.

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Thereupon: EVA M. HOLLAND, being a witness of lawful age, having been first duly sworn according to law, was [fol. 7] examined, and testified as follows:

By the Clerk:

Q. State your name and address, please.
A. Mrs. Eva M. Holland, 1802 Wickes Avenue.

Direct examination.

By Mr. Freeze:

Q. Mrs. Holland, with whom are you employed?

A. Maryland State Board of Motion Picture Censors.

Q. And how long have you been employed there?

A. 15 years.

Q. Were you working with the Board on or about November 1st, 1962?

A. Yes, sir.

Q. I direct your attention to that date, would you tell The Court in your own words what if anything unusual happened to you on that date with particular reference to this particular case?

A. Well, I received a call, a telephone call from Mr. Ronald Freedman at the Rex Theater advising the Board that he had a film up there entitled Revenge at Daybreak, which he intended to exhibit that day without submitting [fol. 8] to the Board, without submitting the film to the Board for examination and licensing.

Q. And what was the extent of your conversation with Mr. Freedman?

A. I advised Mr. Freedman if he exhibited the film it would be in violation of the law. However, he told me that that was the purpose, that he was challenging the constitutionality of the motion picture censorship.

Q. Now, based on this conversation with Mr. Freedman. what did you then do?

A. I was directed to visit the Rex Theater, which I did that evening, and found that the film was exhibited in its entirety.

Q. And that was the film Revenge at Daybreak, is that correct?

A. Yes, sir.

Q. And that is the same film which we have offered here in court today as State's Exhibit Number 2?

A. Yes, sir.

Q. Now, did you have any conversation with Mr. Freedman at the Rex Theater when you viewed the film Revenge [fol. 9] at Daybreak?

A. Yes, I did. After the film had been exhibited I talked with Mr. Freedman and gave him a violation order as to the showing the film in violation of the law; and, he accepted the order in the presence of his attorney.

Q. And your records at the Board of Motion Picture Censors then indicate that the film Revenge at Daybreak had never been shown to the Board prior to your going there on November the 1st, is that correct?

A. It had never been submitted to the Board prior to my visit to the theater and has never been submitted to the Board for examination and licensing.

Mr. Freeze: Witness with you.

Cross examination.

By Mr. Whiteford:

Q. Miss Holland, how long have you been associated with Maryland State Board of Censors?

A. 15 years.

Q. And in what capacity were you first associated with them?

A. For six years as a member of the Board.

[fol. 10] Q. Those were the first six years?

A. Yes, sir.

Q. And, thereafter in what capacity have you been associated with the Board?

A. As Chief Reviewer.

Q. What are your functions as chief reviewer?

A. Well, to examine all motion picture films that are submitted to the Board for licensing.

Q. Are you familiar with the procedures at the Maryland State Board of Motion Picture Censors?

A. Yes, sir.

Q. Miss Holland, are you familiar with the standards set out in Article 66 A, Section 6, in regard to motion pictures that are submitted to the Board?

Mr. Freeze: Objection.

The Court: Overruled, she can answer. Section what now?

Mr. Whiteford: Article 66 A, Subsection 6.
The Court: 6, all right, overruled.

By Mr. Whiteford:

[fol. 11] Q. Miss Holland, I would like to read from a portion of that Article 66 A, this is sub-section 6B—

Mr. Freeze: The State will again renew its objection, Your Honor.
The Court: Well, let him finish his question and let me see, I will rule on it after he completes his question.
Mr. Whiteford: It reads:
For the purposes of this Article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

By Mr. Whiteford:

Q. Did the film Revenge at Daybreak violate the standard?

The Court: Well, she never saw it, said she never reviewed it.
Mr. Whiteford: She saw the whole film. Her testimony was, sir, at the Rex Theater.
[fol. 12] The Court: Did you see whole film?
Witness: Yes, sir.
Mr. Freeze: We again object to the question.
The Court: Sustained.
Mr. Whiteford: May I ask why, sir?
The Court: No, you may not. My answer would be very simple, I sustain the objection.

By Mr. Whiteford:

Q. Miss Holland, are you familiar—

The Court: You are contesting the Constitutionality of this statute, the question before me is not whether or not this film is obscene or not, as I understand it.

Mr. Whiteford: Your Honor, Mr. Freedman has been charged and I will read from the indictment.

The Court: I know what he has been charged with.

Mr. Whiteford: Without having first submitted for approval and license by the Maryland State Board of Censors a certain motion picture film.

The Court: I sustain the objection.

Mr. Whiteford: It is our position, sir, that this is a two-pronged argument that the State is making that Mr. Freed-
[fol. 13] man did not submit for license or approval. I think we are entitled to go into what constitutes approval by the Board, in order to determine whether or not the State can validly bring a criminal charge for failing to submit for approval. I think it is essential for us to know what approval consists of.

The Court: I will sustain the objection.

By Mr. Whiteford:

Q. Miss Holland, are you familiar with Article 66 A, Section C of the Maryland Annotated Code of Maryland, sub-section 6?

A. Yes.

Q. Sub-section C?

A. Yes.

Q. And that section reads as follows:

For the purposes of this Article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as de-
[fol. 14] sirable, acceptable or proper patterns of behavior.

Did you find the film Revenge at Daybreak to violate the sub-section?

Mr. Freeze: Objection.

The Court: Sustained.

By Mr. Whiteford:

Q. Miss Holland, are you familiar with Article 66 A, sub-section 6 D which reads as follows—

A. Yes. Yes, sir.

Q. For the purposes of this Article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

Did the film Revenge at Daybreak violate this sub-section of the Maryland Code?

[fol. 15] Mr. Freeze: Objection.

The Court: Sustained.

Mr. Whiteford: Your Honor, I would like to proffer at this time, the answer to the three questions that have been asked and in each case would be negative and that Miss Holland's answer, if permitted to answer, would have been no, that the film did not violate any of the standards set forth in this act.

The Court: Very well.

By Mr. Whiteford:

Q. Miss Holland, if a film were submitted to the Maryland State Board of Censors, and a license fee were not tendered with that film, would or would not the film be reviewed?

Mr. Freeze: Objection.

The Court: Let her answer. Overruled.

A. I beg your pardon, would it or would it not be reviewed?

By Mr. Whiteford:

Q. Yes.

A. No, because it sets forth in the law that the applicant has to be, the application has to be, it is set forth in the [fol. 16] law that the application must be applied for and it must be paid for before it is examined.

Q. It is correct, then, is it not, that if a film were submitted and the fee set out in the law were not tendered

with the film that it would not be possible to secure a censor's seal for that particular film?

A. No, sir, not the way that the law is set forth at the present time.

The Court: You said you are not a member of the Board?

Witness: I am not a member of the Board.

By Mr. Whiteford:

Q. Miss Holland, do you ever vote as a member of the Board in your present capacity?

A. No, sir, films are licensed by the Board members.

Mr. Whiteford: That is all I have, sir.

Redirect examination.

By Mr. Freeze:

Q. Miss Holland, after reviewing the film at the Rex Theater, you then took out a warrant, is that correct?

A. That is correct, sir.

[fol. 17] Q. And you were instructed to do so by members of the Board?

A. By the chairman; yes, sir.

Q. Where did you obtain that warrant?

A. At the Northeastern.

Q. Police station?

A. Yes, sir.

Q. And a warrant was signed for the arrest of the defendant here Ronald L. Freedman, is that correct?

A. Yes, sir.

Q. When you issued a violation notice to Mr. Ronald Freedman for not submitting the film to the Board, this was on instructions of the Board, is that not correct?

A. That is right, by direction of the Board.

Mr. Freeze: I have no further questions.

Mr. Whiteford: No questions.

The Court: Step down, please.

Mr. Freeze: Your Honor, there is an additional stipulation between the State and counsel for the Defendant that Officer Peter J. Cacano if in court today would testify

that he served the warrant from Northeastern Police Sta-
[fol. 18] tion on Mr. Freedman; and, at that time there was a service of the warrant and that would be his only testimony here in court today.

STATE RESTS

With that the State will rest, Your Honor.

The Court: The Defense?

MOTION FOR A JUDGMENT OR A VERDICT OF ACQUITTAL AND DENIAL THEREOF

Mr. Whiteford: Your Honor, I would like to move at this time for a judgment or a verdict of acquittal.

The Court: Very well, your motion is denied. Your motion is denied.

OFFER IN EVIDENCE

Mr. Whiteford: All right. Your Honor, I would like to offer into evidence the rules of the Maryland State Board of Motion Picture Censors as they appear in the publication issued by the Maryland State Board of, Maryland State Board of Censors; and, they can be found on pages 11, 12 and 13 of that publication.

The Court: Very well, have it marked as a Defendant's exhibit.

Mr. Freeze: We will object to that, Your Honor, for the record.

The Court: Well, for the record, I will overrule the
[fol. 19] objection.

(Thereupon the afore-mentioned rules were then marked Defendant's Exhibit Number 1)

Mr. Whiteford: Mr. Freedman.

Thereupon: RONALD L. FREEDMAN, the defendant, being of lawful age, having been first duly sworn according to law, was examined, and testified as follows:

By the Clerk:

Q. State your name and address, please.
A. Ronald L. Freedman, 3501 St. Paul Street.

Direct examination.

By Mr. Whiteford:

Q. Mr. Freedman, how old are you?
A. 30.
Q. Are you a graduate from any college?
A. Yes.
Q. What school and what degree?
A. University of Maryland, Bachelor of Arts.
Q. Before going into the motion picture exhibiting busi-
[fol. 20] ness what positions have you held?
A. In the movie business?
Q. Outside of the movie business?
A. I was a public school teacher for five years.
Q. How long have you been associated in the motion picture business as such?
A. In various capacities, since the age of 16 starting as an usher and various other sundry jobs in the exhibition end of motion picture business.
Q. And you are now the lessee of the Rex Theater, is that true?
A. Yes.
Q. Located here in Baltimore City?
A. Yes.
Q. And as lessee of the Rex Theater are you also the manager of the theater?
A. Yes.
Q. Did you cause to be exhibited on November the 2nd, 1962 the film Revenge at Daybreak?
A. Yes.
Q. Did that film have any censor seal on it when ex-
[fol. 21] hibited?
A. No.

Q. Was the film ever submitted to the Maryland State Board of Censors before exhibiting?

A. No.

Q. Why not?

A. The act of exhibiting the film without a censors seal was an attempt on my part to challenge the constitutionality of the Maryland Censorship statute.

Q. Mr. Freedman, previous to exhibiting the film Revenge at Daybreak, had you had a series of disputes with the Maryland State Board of Censors?

A. Yes.

Q. And as a result of one of those disputes did you in fact take an appeal through the Civil courts involving the film The Lovers?

A. Yes.

Q. Why don't you choose a similar route to appeal decisions you thought were arbitrary of the censor board on subsequent films?

[fol. 22] A. Well, as a practical matter, an appeal on individual films is somewhat useless. The Board has very wide discretionary powers to cut or ban films and for an individual to appeal it takes a great deal of time, a great deal of money. It is a burdensome and onerous process; and, ultimately if you achieve a victory in the courts, as I did with The Lovers, and the censor board is reversed, it has no bearing on similar or identical films in that the Board is not compelled to follow court precedent.

Q. Mr. Freedman, have you ever attempted to submit a film to the Maryland State Board of Censors without tendering the required license fee?

A. Will you repeat that question, please?

Q. Have you ever submitted or attempted to submit to the Maryland State Board of Censors a motion picture for review without tendering the license fee?

A. Yes.

Q. What was the result of that attempt?

Mr. Freeze: Objection, unless it is to this particular case.

The Court: Overruled, let him answer.

[fol. 23] A. Yes.

By Mr. Whiteford:

Q. What was the result of that attempt?

A. The result was a refusal to review the film because I had not paid the license fee.

By the Court:

Q. What is the amount of the license fee, Mr. Freedman?

A. It is according to the measurement of the film, the longer the film the more the license fee. It is in the statute the exact—

Mr. Whiteford: It is sub-section 11.

The Court: Well, just want to get some idea generally; and, in an ordinary film just what it would be, what the range would be.

Witness: The average cost for 90 minutes film would be around $30.

By Mr. Whiteford:

Q. Have, in the past, you yourself paid these fees when submitting films to the censor board?

A. Yes.

[fol. 24] Q. You paid no such fee for Revenge at Daybreak, I take it?

A. Yes.

Q. You mean yes that you did not pay the fee?

A. Yes, I did not pay the fee.

Q. Mr. Freedman, to your knowledge had this film Revenge at Daybreak ever been submitted to the Board by anyone other than yourself?

A. To my knowledge it had not.

Q. From whom did you get the print?

A. Times Film Corporation.

Q. What City do they operate from?

A. New York.

Q. Did you sign a contract or a leasing-licensing arrangement with them?

A. Yes, sir, I did.

Q. Handing you a piece of paper and ask you if you will identify it, please?

A. Yes, this is the contract for licensing of the film Revenge at Daybreak at the Rex Theater in Baltimore.

[fol. 25] Mr. Freeze: This is the contract that has previously been submitted into evidence as a stipulated exhibit.

Mr. Whiteford: Thank you, that is all I have.

Cross examination.

By Mr. Freeze:

Q. Mr. Freedman, in this case, then, you submitted, you told the motion picture representative of the motion picture board that you were not submitting the film Revenge at Daybreak and that you planned to show it without submitting the film for license, is that not correct?

A. Yes, that is correct.

Q. And, as a result of that conversation you actually did show the film on November 1st, without ever having submitted it to the board for approval or license?

A. Yes, that is correct.

Mr. Freeze: No further questions.

By the Court:

Q. Did you make any special advertising to the public that you were exhibiting a picture that had not been ap-
[fol. 26] proved by the Board of Censors?

A. I advertised the picture as an attraction with no mention of the censorship issue.

Q. Just like any other film?

A. Yes, sir.

The Court: Very well, anything else, Mr. Whiteford?

Redirect examination.

By Mr. Whiteford:

Q. Mr. Freedman, I show you a page from the News-Post, the Baltimore News-Post dated November 1st, 1962, and point out to you a particular advertisement in the paper, can you identify that?

A. Yes, that is an advertisement for the motion picture Revenge at Daybreak which showed at the Rex Theater.

Mr. Whiteford: Your Honor, I would like to have this marked as a defendant's exhibit.

The Court: Well, have it marked.

Mr. Whiteford: Lost track of numbers.

The Clerk: Number 2.

[fol. 27] (Thereupon the afore-mentioned advertisement was then marked Defendant's Exhibit Number 2.)

Mr. Whiteford: I have no further questions.

The Court: Anything else, gentlemen?

Mr. Whiteford: Your Honor, at this time we would request that the Court adjourn to suitable quarters to review the film Revenge at Daybreak. And, Your Honor, before you rule on this matter there is something we would like to point out to you, and that is that the Supreme Court recently held in the question of this nature that it is important for the record to have a full dress argument and briefing of all the facts and circumstances involved.

I think Your Honor knows that the subject of censorship is a very touchy one and that it has been in the courts in connection with works of literature and, more specifically, with motion pictures, for the past several decades.

I think that the courts are generally agreed that if a censorship statute, such as this, is valid at all, which is highly doubtful to begin with, that it is only valid if the [fol. 28] statute is construed and applied in an extremely limited manner. Since the defendant in this case was charged not only for failure to obtain a license, but also for failure to obtain the advance approval of the contents of the film, and since this statute was therefore very much construed and applied to him, I think the film itself, which is an exhibit here, becomes very important. And, I think that in view of the law on the subject, and there is a Maryland case which I respectfully like to call the Court's attention to, it is 340, cited in 340 US 268, the case of Nemoto against Maryland involving—

The Court: 340 US?

Mr. Whiteford: On page 268, Your Honor, involving very similar facts and circumstances, the only difference being that there was a speech involved there and not a motion picture, rather not a speech in the form of a motion picture, but a speech in the form of a public address. And the Supreme Court there—and, indeed, the whole court considered the nature of the speech, and I believe that if, in view of this and the other citation that I mentioned [fol. 29] before, which is the case of Manuel Enterprises versus Day, that is cited in Volume 370 United States reports, at page 480, in which the Supreme Court held that it is very important to preserve the records and to have all the facts and circumstances before the court. I think it is crucial at this time that the full film be looked at.

The Court: Well, picture Revenge at Daybreak sounds like a picture I would like to look at.

Mr. Whiteford: I am afraid that we are one day late with the film, Your Honor, because subject matter of the film is the Irish Revolution. But, we would be very happy to show it to Your Honor.

The Court: May I ask this, is the State contending that this picture is obscene or that the Board would not have approved it had it been submitted to them for review?

Mr. Freeze: The State is not so contending, Your Honor.

Mr. Whiteford: Well, I don't think, Your Honor—

The Court: Although I would love to see this picture, [fol. 30] if the point isn't raised that this picture is obscene, is there any point in my viewing this picture?

Mr. Whiteford: Well, I think it is important for two reasons, Your Honor. In the first place, I think it is important for the preservation of the record of this court.

The Court: Very well, I am perfectly willing to enjoy reviewing it, but I am just wondering when that could be done. It takes about, how long a picture is it?

Mr. Whiteford: It is about, it is a little over an hour, Your Honor.

The Court: A little over an hour.

Mr. Bilgrey: I think it is important for another reason, Your Honor.

The Court: I will be very happy to review it, have to set up the cameras in chambers, would we, where could I watch

this picture? I am just wondering in the light of the fact that we have other cases in the assignment.

(Off the record discussion.)

The Court: Mr. Bilgrey and Mr. Whiteford, we have one [fol. 31] remaining case in the assignment, in addition to the present case. We can suspend the trial of this case.

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[fol. 32]

IN THE CRIMINAL COURT OF BALTIMORE

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STATE OF MARYLAND,

—vs.—

RONALD L. FREEDMAN.

Indictment # 4273

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Baltimore, Maryland,
March 19, 1963.

Before Honorable Anselm Sodaro, J.

Appearances:

Robert T. Freeze, Esquire on behalf of the State.

Messrs. Richard C. Whiteford and Felix Bilgrey, on behalf of the Defendant.

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The Clerk: Ronald Freedman. Mr. Whiteford.

The Court: Very well, gentlemen, The Court is ready.

Mr. Whiteford: Your Honor, I would like to dictate a [fol. 33] notation in the record that yesterday afternoon The Court, in company with Mr. Freedman, and lawyers on the side of this case, viewed the full length of the film Revenge at Daybreak at the theater at the State office building in the premises of the Maryland State Board of Censors.

The Court: Very well.

Mr. Whiteford: Mr. Gebhart, you bring the records, do you have the records? Yes, sir.

Thereupon: ELWOOD L. GEBHART, being a witness of lawful age, having been first duly sworn according to law, was examined, and testified as follows:

By the Clerk:

Q. State your name and assignment, please, sir?

A. My name is Elwood L. Gebhart, Administrative Assistant for the Maryland Censor Board.

Direct examination.

By Mr. Whiteford:

Q. Mr. Gebhart, how long have you been associated with [fol. 34] the Maryland Censor Board?

A. About five years.

Q. Have you been the administrative assistant to the Board during that period of time?

A. I have.

Q. What are the duties of the administrative assistant of the Censor Board?

A. I am in full charge of the office, the fees, paid applications, the fees paid for examining films, deposits to the State treasury, and all administrative matters of the Board.

Q. You have nothing, as such, to do with the actual review of motion pictures, is that correct?

A. That is correct.

Q. And your function merely is that of administrative officer in keeping records and retaining financial records and receipts for the Board?

A. Yes, once in a while we are called, I am called upon to make an inspection, or I have sat in on films and reviewed them, but, of course, all the decisions are made by the Board.

[fol. 35] Q. When you say make inspections, you mean make inspections of theaters?

A. That is correct.

Q. And how often do you do that?

A. Periodically, maybe once a month or maybe once every two months, specific assignments.

Q. In response to a summons issued have you brought with you today the financial records of the Maryland State Board of Censors?

A. I have the state—I have the ledger book for the last three years which you required, and I have the annual reports of the Board for the last three years.

Q. May I see the annual reports?

Mr. Freeze: For the record, Your Honor, I assume Mr. Whiteford is ready to offer the exhibits as an exhibit for the Defense; and, the State will offer an objection to that.

The Court: Well, I will overrule the objection and let's see how far we can go.

OFFERS IN EVIDENCE

Mr. Whiteford: Your Honor, Mr. Gebhart just handed [fol. 36] me the 44th, 45th and 46th Annual Reports of the Maryland State Board of Censors which covers the years 1959, 1960, 1961 and 1962. I would like to offer these in evidence.

Mr. Freeze: The State renews its objection.

The Court: Mr. Whiteford, maybe I am not following this case at all. What is the purpose of burdening the record with the reports of the Board going back to 1959.

Mr. Whiteford: The specific purpose of this proffer, Your Honor, is to show from the annual reports of the Censor Board, that the Censor Board for a period of years has charged fees for censoring motion pictures, that they have shown a profit out of this, and that the one purpose of the Board is a taxing source of the State of Maryland. And that we, of course, are going to maintain that any tax on the freedom of speech or press is unconstitutional.

The Court: Very well, I will admit them.

(Thereupon the above-mentioned reports were then marked Defendant's Exhibit Number 4.)

[fol. 37] By Mr. Whiteford:

Q. Mr. Gebhart, are you personally familiar with any legislation presently pending in our State Legislature in

regard to the Maryland State Board of Censors, and the raising of the fees charged by the Censor Board?

Mr. Freeze: Objection.

The Court: Let him answer, if he knows.

Witness: Yes, I am.

By Mr. Whiteford:

Q. You know the sponsor of that bill?

A. I believe it was introduced by the speaker Mr. Boone.

Q. Do you have a copy of that bill in your records?

A. I don't have it with me, but I have one at the office, it is Bill 423, House Bill.

Q. Would I be correct in saying that the general purpose of House Bill 423 is to raise the level of the fee now charged for the censoring of motion pictures?

[fol. 38] A. The bill is to raise the fee, the licensing of duplicate films of the censor board from a dollar to a dollar and a half.

Q. And is the purpose of the bill to secure more revenue for the Maryland State Board of Censors?

Mr. Freeze: Objection, Your Honor.

The Court: Sustained, the bill ought to speak for itself. I don't know whether it is to raise revenue or to take care of expenses of running this Board. The bill certainly ought to speak for itself. I will sustain the objection. If you have a copy of the bill you may introduce it later in the proceeding.

Mr. Whiteford: I am going to ask Mr. Gebhart to get his copy and produce it. I would prefer to do it that way.

The Court: It doesn't make any difference really. All right.

By Mr. Whiteford:

Q. Mr. Gebhart, can you get a copy of that bill and produce it here in court?

A. Yes, I can.

[fol. 39] Q. I would appreciate it if you would do that for us.

Mr. Whiteford: Your Honor, I have no further questions at this point.

Mr. Freeze: The State has no questions.

The Court: Step down, please.

Mr. Whiteford: Mr. Mason.

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Thereupon: NORMAN MASON, being a witness of lawful age, having been first duly sworn according to law, was examined, and testified as follows:

By the Clerk:

Q. Name and assignment, please.

A. My name is Norman Mason, Crisfield, Maryland.

Direct examination.

By Mr. Bilgrey:

Q. Mr. Mason, how long have you been on the Board of Censors?

A. I have been on the Board, it will be four years the 4th day of this coming month of April.

[fol. 40] Q. And is that an appointive position?

A. Yes, sir.

Q. From whom did you get your appointment?

A. From the Governor, sir.

Q. What is your annual compensation?

A. Present time it is $4500 a year.

Q. And in the Act there is reference made to other compensation for actual and incidental expenses. Do you draw any other incidental expenses, and I am referring now to Section 12 of the Act?

A. I get hotel expenses and so forth.

Q. It states that that is in reference with attending meetings?

A. Yes, sir.

Q. Do you attend any meetings on behalf of the Board of Censors?

A. Yes, sir, we have regular scheduled meetings, the whole Board does, yes, sir.

Q. I see. You meet with other censors outside of the State?

A. I have been to the New York Censor Board, and [fol. 41] I think a fellow by the name of Pauche, possibly you may know him, and just looking over his operation, see if we could improve ours, or anything like that.

Q. I hope you understand, Mr. Mason, we are merely asking these questions because of our contentions in connection with the Constitutional invalidity of the Act; and, that we in no way want to embarrass you by asking these questions.

A. Perfectly all right, I have nothing to hide, sir, not a thing.

Q. Mr. Mason, what are your regular hours of work?

Mr. Freeze: Objection.

By Mr. Bilgrey:

Q. With the Board?

The Court: What is the purpose of that question, Mr. Bilgrey?

Mr. Bilgrey: We want to show Your Honor that Mr. Mason is, as one of the members, regularly looks at motion pictures during regular hours in order to judge, pass on.

[fol. 42] The Court: Well, let him answer. What are your working hours?

Witness: It is impossible to say; for instance, this week I left home about 2:00 o'clock Sunday, and I will be here until Thursday. Some weeks it isn't as busy as others and I will be here just a couple of days. I will say between two and four days a week.

By Mr. Bilgrey:

Q. This is a full time position, then?

A. No, sir. No, sir, between two and four days a week.

Q. You hold any other positions?

A. With the State? I have other businesses home in Crisfield.

Q. I see. You mean you have another commercial position that you are employed with?

The Court: Can't make a living on $4500 a year, I guess, and you have a business of your own, do you?

Witness: Yes, sir, and I just started getting that a short time.

[fol. 43] The Court: All right.

By Mr. Bilgrey:

Q. Mr. Mason, what was your occupation prior to being with the Censor Board?

A. Since 1935 I have been in the coal and concrete business, also have a little hardware business.

Q. Mr. Mason, does the Board of Censors examine every motion picture which is shown in the State of Maryland, or are there exceptions provided for in the statute?

A. Now, are you talking about the Board members or the reviewers?

Q. I am talking about the reviewers?

A. The reviewers review all pictures that come to the State of Maryland with the exception of news reels.

Q. Well, are you a reviewer?

A. No, sir, I am chairman of the Board.

Q. I see. Do you look at films on your own with the board members?

[fol. 44] A. Sometimes I do, of course, my job is a lot more to it than just reviewing film.

Q. Could you describe your functions briefly other than—

Mr. Freeze: Your Honor, I think we are going very far afield here.

The Court: Well, let's find out what he does. Overruled. What do you do in connection with your duties?

Witness: Well, there is a tremendous amount of paper work is one thing. And, of course, I do look at a lot of the film, but primarily paper work and films, looking at films, is the two main things.

By Mr. Bilgrey:

Q. Mr. Mason, I would like to renew my question about whether the Board views all films that are shown in the State of Maryland; and, let me limit it first to commercial theaters?

A. No, sir, we do not review newsreels, but other than that, yes, we do.

Q. How about features that are shown on television, do you review those?

[fol. 45] A. No, sir, that comes under a different department altogether, sir.

Q. Do you know if it comes under any department?

A. I don't know, I understand it comes under the FCC, I believe it is, the Federal Communications Commission, that is what I understand. I don't know that, no, sir.

Q. You do not review films shown on television?

A. A lot of it originates from California.

The Court: He couldn't possibly do it. He reviews films in commercial theaters, except newsreels.

By Mr. Bilgrey:

Q. What about films shown in Enoch Pratt Public Library, do you censor those?

A. Oh, I don't think so, that is non-commercial.

Q. How about films shown for educational or charitable purposes?

A. Generally speaking we don't, if it is non-commercial.

Q. So that there is an area, then, where films, feature [fol. 46] films can be shown in the State without being submitted to you for censorship?

A. If it is non-commercial I would say yes.

Q. Now, Mr. Mason, Section 3 of the Act states that: The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors.

Do you consider yourself well qualified to act?

A. I do, I don't know whether anyone else does, but I do, I guess.

Q. Well, may I ask you what schools you attended, Mr. Mason?

A. High school is all.

Q. You go to college?

A. No, sir.

Q. Did you take any course in literature or in the arts?

A. Just a normal high school education.

Q. Do you know what a classic is?

A. Let's go into details a little more. What do you mean [fol. 47] by what is a classic?

Q. Well, a classic book, for example, would you know what that is?

A. Well, sir, I am primarily interested in motion pictures.

Q. Did you read any of Shakespeare, for example?

A. I have read some, yes, sir.

Q. Would you consider him a classic?

A. I never thought of him that way, but, I mean, I am not qualified to answer that question.

Q. Do you do a lot of reading, Mr. Mason?

A. Quite a bit, sir.

Q. Now, in connection with your judging of films, do you read any of the out of town reviews?

A. Yes, sir.

Q. You read the New York Times?

The Court: Not recently, I guess, not recently.

A. We have publications that come to our office all the time, I read those.

By Mr. Bilgrey:

Q. Do you read the reviews of motion pictures?

[fol. 48] A. Quite often, I do, yes, sir.

Q. Do you consider those reviews in arriving at your decisions as to whether or not to pass films?

A. I would not use the word; we consider it, of course, anything that comes into our office that is helpful, we read it and, then, of course, we use our own judgment, if that is what you mean. I mean, when we review films that has no bearing on the ultimate outcome.

Q. Has no bearing on the ultimate outcome?

A: Not necessarily, no bearing, I will put it that way.

Q. In connection with your function as motion picture censor do you consider whether or not the film has any academic awards or merits?

A. I would say of course we do if it has any merit.

Q. Are you familiar with the Academy Awards?

A. Somewhat.

Q. How about the Foreign Film Festivals?

A. Sir, we have 1354 pictures come across, come in our [fol. 49] office last year and to pinpoint any one picture it is very, very, very difficult.

Q. Now, Mr. Mason, I am going to ask you some questions about the standards in the act. I am referring specifically to Section 6 of Article 66 A of the Annotated Code. Now, subsection A of that Article, of that section, provides that: The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes.

May I have your own definition as to what the term moral and proper means?

Mr. Freeze: Objection.

The Court: Sustained. Wouldn't that depend on the film?

Mr. Bilgrey: Your Honor, I knew that Mr. Freeze, my learned brother, was going to object to this, and before [fol. 50] you rule on the objection, in connection with our question, may I be permitted to address myself to The Court?

The Court: Yes.

Mr. Bilgrey: Because I believe that the application of the standards is the crux of this case, and that they should be permitted in.

Now, there are two main reasons, Your Honor, why we believe that these standards should be allowed in, as to

what the various board members do with these standards, how they apply them, how they construe these standards.

The first reason, Your Honor, is connected with the Rules of Evidence. Now, the real test of the admissibility of the evidence is the connection between the fact that we seek here to prove with the offense charged. The question is whether or not we have drawn the standard, the standards used in this law, into issue by Mr. Freedman's failure to submit to the standards.

Now, Your Honor, I would like to cite from several [fol. 51] cases in the Supreme Court and, a Maryland case in support of this proposition that these standards are indeed very much before The Court. The first case I should like to cite from is the case of The Mott Company against Maryland.

The Court: I don't mind hearing your argument, what I am trying to find out is, your question is what is the definition.

Mr. Bilgrey: My question is what is the definition.

The Court: Of what?

Mr. Bilgrey: Of the various standards contained in this—

The Court: Well, wouldn't he have to—I don't know whether Mr. Webster could give you a definition without reviewing his own written definition. I will sustain the objection.

By Mr. Bilgrey:

Q. Well, Mr. Mason, let me ask you this question. Are you familiar with the recent Supreme Court decisions in the past ten years or so rendered in connection with cen- [fol. 52] sorship of motion pictures?

A. See, I haven't been on the Board ten years, but I have read most of those decisions.

Q. I see. Have you read the Burston Decision?

A. I can't quite recall. You see, in other words, when we need something like that we have that information in hand, and it isn't necessary to remember it by heart.

Q. Well, Mr. Mason, Section 20-A of Chapter 66A provides that no advertising matter shall be permitted which

is sacrilegious. Are you familiar with the fact that that standard was knocked out in the Burston case by the United States Supreme Court?

A. Yes, sir, I am familiar with that, sir.

Q. Mr. Mason, Section 6 A of the law states that you shall approve and license such films or views which are moral and proper.

Are you familiar with the case of Holmsby against Vaughn which involved the film called The Moon Is Blue in the United States Supreme Court—

Mr. Freeze: Objection, Your Honor.

[fol. 53] The Court: Well, are you or not?

Witness: No, sir.

The Court: He is not.

By Mr. Bilgrey:

Q. Mr. Mason, Section 6 C provides that a film is immoral if its exhibition would tend to debase or corrupt morals, if its dominant purpose or effect is erotic or pornographic. Are you familiar with the decision in the United States Supreme Court involving a film called Lady Chatterley's Lover a few years ago?

Mr. Freeze: Objection.

The Court: Let him answer.

Witness: Yes. Yes, sir, I am familiar with that particular picture.

By Mr. Bilgrey:

Q. You read the case?

A. Yes, sir.

Q. Do you know, then, that this same identical standard has been knocked out and held invalid by the United States Supreme Court?

Mr. Freeze: Objection.

[fol. 54] The Court: Well, do you know that? Overruled. Do you know it or not?

Witness: Sir?

The Court: Do you know that that standard has been knocked out by the Supreme Court decision?

Witness: They permitted that picture.

The Court: Yes. He knows it has been knocked out.

Witness: The Supreme Court permitted that picture to be shown.

By Mr. Bilgrey:

Q. You know the standard has been knocked out?

A. I don't know the legal term, but I know they permitted the picture. Let me put it my way, then I will be able to answer it for you.

Q. You know it involved the same standard, Mr. Mason, having knowledge of the fact that these standards have been knocked out by the United States Supreme Court, have you still continued to employ the use of these same standards in the censoring of films?

A. Sir—

[fol. 55] Mr. Freeze: Objection.

The Court: Well, let him answer. Let him answer.

Witness: Sir, each picture is altogether different. It depends upon the circumstances why certain scenes would be allowed in a picture; and, maybe other circumstances possibly it would not be. I mean, each picture has to go on its own. I mean, in other words, you can't very well take one picture and it has been a guide only to a certain degree.

(Question read)

By Mr. Bilgrey:

Q. Is your answer yes?

A. No, it isn't yes. Each picture has to stand on its own merits, I mean, rarely do you see two pictures, in fact, I have never seen two pictures identically alike; and, certain parts of a picture tends to make it altogether different than other parts in the picture.

Q. I would still like to get an answer yes or no.

The Court: Well, the answer to the question is, Mr. [fol. 56] Mason, as I understand it, knowing these standards have been knocked out by the Supreme Court, do you still use those same standards?

Witness: No.

The Court: The answer is no.

By Mr. Bilgrey:

Q. What standards do you use if you do not use the standards that are contained in Section 6? What standards do you use, that is what we are trying to find out.

A. With each picture depends solely on itself. No way to make a general answer of that particular question.

Q. You use different standards, then, in connection with your judging of every individual film?

A. Any portion of any picture that the Supreme Court has ruled on we try to go by the Supreme Court ruling. I mean, we don't try to overpower those boys, is that what you mean?

Q. I am really not trying to embarrass you.

The Court: Well, ask the question now. He is not embarrassed, I don't think.

[fol. 57] By Mr. Bilgrey:

Q. Merely like to establish what the standards are that are used by the Board since they obviously do not use the standards or you do not use the standards set forth in Section 6?

Mr. Freeze: Objection, Your Honor, that is a characterization not identified with the evidence in the case.

Mr. Bilgrey: Well, he said that.

The Court: Well, start again, let's start again. What is your question?

By Mr. Bilgrey:

Q. Mr. Mason, what standards do you apply to the banning or passing of on particular films?

A. Well, nudity would be one.

Q. You mean you ban every nudist film?

A. Sir, now you are telling me, let me answer the question, if you will, please. Nudity would be one of the reasons. Then, the next thing would be a narcotics picture showing, we will say, putting a needle in a kid's arm, we are very much opposed to that. And there are other things [fol. 58] that we would be opposed to. Now, that doesn't necessarily mean that a nudist camp picture we would ban.

Q. You would not ban a nudist camp film?

A. Generally speaking, no, we would not, generally speaking.

Q. Why not?

A. I think there has been a Court of Appeals ruling, if I remember right, on that particular type picture.

Q. I see. What if it were a very entertaining nudist film?

A. Sir, it would, depends solely on what is in the film. I mean, to answer a question like that is, I just can't do it, I mean, I don't know how to answer it.

Q. On what basis would you ban a nudist film, for example?

A. Well, say, for instance, a man and woman was making love in a nudist camp, we would definitely ban that.

Q. You mean if the film showed the sexual act?

[fol. 59] A. No, sir.

The Court: I didn't hear your question.

By Mr. Bilgrey:

Q. On what basis would you ban a nudist film.

The Court: Oh, my, go ahead.

A. Well, say, in a nudist camp, say if a man and woman were making love, not necessarily a particular act this referred to, but if they were making love, we would consider very strongly of cutting that portion out.

By Mr. Bilgrey:

Q. Suppose it was just an entertaining nudist film that took place outside of a nudist camp, and there was no intimation of any making love?

A. Sir, these questions are very difficult, it would have to depend solely on what the rest of the picture was, it is awfully difficult to answer the questions you are asking.

Q. Let me ask you, Mr. Mason, how do you judge, in arriving at your judgment, the effect of what persons, are you concerned with, are you concerned with the average person, or let me rephrase that question. In arriving [fol. 60] at your decision are you concerned with the effect that a particular film will have on the average person in this State?

A. I would say we consider all the people as a whole, primarily.

Q. That includes children?

A. Definitely.

Q. So that suppose you were to see a film which you think can affect children or juveniles up to the ages of 16 or 17, and you would consider that film unfit for that particular class, would that affect your judgment?

A. I would say it would affect it. Now, what it would do to the ultimate outcome, I couldn't tell you because I don't know, I mean the question that you are asking is very difficult to answer from here and not looking at the picture.

Q. But, you would consider the effect it would have on—

A. On everybody, yes. On all people, yes, sir.

Q. How about feeble-minded persons?

[fol. 61] The Court: Who?

Mr. Bilgrey: The feeble-minded.

The Court: The feeble-minded?

Mr. Bilgrey: Yes, sir.

Witness: We would take those people into consideration.

By Mr. Bilgrey:

Q. Mr. Mason, I assume that seeing all those films has not changed your way of life any?

The Court: Has changed his way of life?

Mr. Bilgrey: Yes, sir.

The Court: That is not a proper question. I will sustain the objection if there is one.

Mr. Freeze: Your Honor, I was about to object again to the whole line of questioning.

The Court: I don't know whether it has changed his way of life, if it has I don't think it is going to make any difference in this case, hypothetical questions not dealing with a film in question, and hypothetical questions, I think we are going far afield.

By Mr. Bilgrey:

[fol. 62] Q. Mr. Mason, in arriving at a decision, do you consider the direction of the film?

A. I don't know what you are—what you mean by direction of the film?

Q. Well, I am trying to find out what elements in a particular film you consider in arriving at your judgment?

A. I just mentioned the fact that nudity would be one, narcotics pictures and so forth and so on, like that, would be.

Q. How about the production values of a particular film?

The Court: The what?

Mr. Bilgrey: The production values.

The Court: I don't know what it means.

Witness: I don't either, sir.

Mr. Bilgrey: The direction, the acting, the photography, the elements that go into the makeup of the motion picture.

Witness: I have seen several films that we have cut and I thought they were overacted, is that what you mean, [fol. 63] if they overact as well as underact we—

By Mr. Bilgrey:

Q. That is what I mean.

A. In nudity particularly, I am thinking about a person can overact on the screen if nudity is involved, as well as underact.

Q. Well, forgetting about the nudity, I am thinking now about the regular run of the mill film.

The Court: What is your question?

A. We pass them.

The Court: I don't understand your question. What is your question? What do you mean by production values, now that may be a technical term in the motion picture industry, but this is a law court, what do you mean by production values. I don't understand it myself.

Witness: I don't either.

Mr. Bilgrey: Your Honor, like to refer to Section 6 of Article 66 A and with the Court's permission I should like to read Section B.

The Court: Very well.

Mr. Bilgrey: It is a very short section; for the purposes of this article, a motion picture film or view shall [fol. 64] be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires—

The Court: Yes.

Mr. Bilgrey: —and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

Now, my questions to Mr. Mason are directed to the evaluation in his mind of the other merits that are stated in this section.

The Court: I still don't understand your question. Can't you make them a little bit more specific, please, because I don't understand your question. If he does he may answer it. I may not understand the answer. I don't understand production values at all.

By Mr. Bilgrey:

Q. Mr. Mason, what do you consider other merits under this sub-section of the statute?

A. Other merits pertaining to what, sir?

Q. Well, the statute says that the arousal of sexual de- [fol. 65] sires has to be weighed against whatever other merits the film may possess?

A. Sir.

Q. I would like to know what these other merits are in your mind?

A. Sir, that is, each picture has to stand on its own feet, and we would have to look at a picture before I could answer that sensibly, I would say, because don't know in, say the next picture coming into us, what is going to come off next, it depends solely on the picture as to what you, how you classify it.

The Court: Well, that is what the Supreme Court also said, didn't they, if I remember correctly, that a lot of these pictures have to stand or fall on their own bottom, it all depends on the picture. That is true, isn't it?

Mr. Bilgrey: Well, Your Honor, the Supreme Court, I think, has knocked out every single standard.

The Court: Sir?

Mr. Bilgrey: The Supreme Court has knocked out, in-
[fol. 66] validated every single standard that has been before the Court in connection with the censoring of films.

The Court: All right.

Mr. Bilgrey: And it has established that the State has to make out a great burden, a great over riding interest that exists before it can censor films at all, standards have to be very narrowly drawn.

The Court: I understand.

Mr. Bilgrey: And, I am merely trying to arrive at the manner in which this witness feels, that the—

The Court: Well, you go ahead and ask the questions now.

Mr. Bilgrey: Thank you.

By Mr. Bilgrey:

Q. Well, Mr. Mason, you do see a lot of films and you must have some general rule formulated within your mind what the merits are that you will weigh against anything objectionable that you may see in a specific film?

[fol. 67] A. I think this may be the third time I mentioned this. Nudity is one thing we look for, narcotics pictures about putting the needle in the kid's arms and so forth and so on, and so forth and so on, that is the main things we look for.

Q. You have stated the objectionable elements, how about the redeeming values of a motion picture?

A. Sir, I can't see much redeeming value of showing a little kid how to put a needle in his arm to make him high. I can't see that. I don't think there is a picture could, I won't put it that way, I don't think that many pictures could show where that would be advantageous to a kid. And that is one of the things that we look for, and usually I recommend a cut and usually the Board goes along.

Q. Mr. Mason, are you familiar with the ruling of the Maryland Court of Appeals in the Times Film case and in the case of United Artists which involved the picture called The Man with the Golden Arm?

A. I have read that, but to remember all that is physically impossible for me to do it.

[fol. 68] Q. Well, in the Times Film case that involved a picture called The Naked Amazon, have you read that?

A. Yes, sir, I can't remember it word for word by no means.

Q. Are you familiar with the Court's ruling in that case, the film must be considered as a whole?

A. Yes, I remember that portion, the Supreme Court also said it.

Q. How do you consider your authority to effectuate cuts affected by those decisions, if at all?

The Court: I don't understand this question.

Witness: Those questions are very difficult.

By Mr. Bilgrey:

Q. I am sorry, let me rephrase the question. In view of this ruling do you still effectuate cuts to films, do you still eliminate portions from films?

A. Yes, sir. Yes, sir. We still eliminate portions from films, is that your question?

Q. Yes, sir.

A. Yes, sir.

[fol. 69] Q. In other words, if you felt that a particular scene was unsuitable for children, you would eliminate that scene?

A. Again, I think we are going to have to look at the whole picture and not just take a little spot here and a little spot there. I would rather not answer that question, not knowing about the rest of the picture that you are referring to.

Q. But, you feel that certain films lead to crime?

A. I would say it would help, it could help, put it that way.

Q. Have you any statistics in your office to show that, substantiate that proposition?

A. No, I don't have, I don't think we have any statistics on it.

Q. Mr. Mason, if someone were to submit a film to your office, without tendering the licensing fee, would you look at the film?

A. In other words, if he didn't pay the fee would we look at the film, sir, we couldn't, it is against the law to do [fol. 70] that in the State of Maryland, we couldn't.

Q. Mr. Mason, if a film is banned in whole, or in part, or in parts, your law provides for a review, does it not? Your law provides for a review of the banning?

A. Well, of course, if it is, been cut, naturally we would have had to review it before we would recommend a cut.

Q. Could you tell me briefly in your own words how the reviewing procedure operates?

A. If I understand your question properly, we have two reviewers, Miss Holland being the chief reviewer, and Mr. Vaughn. Those two reviewers look at each and every movie, original movie that comes in the State of Maryland, with the exception of newsreels; and, they, after looking at these pictures, if they see anything they think that possibly may need eliminating then they call the Board in and show it to the Board; the reviewers can recommend a cut, but they can't authorize one. And, then, of course, [fol. 71] we look at it and if we think that is proper we go along, if we don't we do say maybe we think the picture is all right as it is.

Q. Supposing the film is banned or portions have been eliminated from the film—

A. Yes, sir.

Q. —does the owner of the film have a right to request a review from your determination?

A. Yes, sir, that is his next step, yes, sir.

Q. Could you in your own words tell us how the procedure of the reviewing method operates?

A. Well, generally speaking, the person who owns a film will bring in his lawyer, or lawyers; generally speaking, we would ask the assistant that is assigned to us in the Attorney General's office to be with us on that particular picture. And, then, of course, we would look at it, as you would any other picture, and just determine from there, and then we try to get some legal advice from the Attorney General's office, don't try to, we get it; in other words, he has been very cooperative.

[fol. 72] Q. As a general rule, would you say that the same reviewers who have seen the film before look at it again on the appeal?

A. The two reviewers are there at all times, yes, they would, generally speaking, look at it again, yes.

Q. Do they ever change their minds, Mr. Mason?

A. I would not use the word never. I would say that they have minds of their own and we don't try to press them. I mean, in other words, we don't tell them we are going to fire them if they don't do what we say. Is that what you mean, we don't threaten them; yes, sir, quite often they could change their mind.

Q. Mr. Mason, before the original ruling do you ever call in the owner of the film to give evidence or to question him before you make a ruling?

A. Not very often, bear in mind that there is a film going through pretty fast and to call each and every person in and some of them maybe lives in New York, some many miles further than New York, some in Washington [fol. 73] and so forth and so on, it would be very difficult to do that.

Q. In other words, you get most of your prints from out of the State?

A. Oh, yes, 98%, I would say. We get most of our trouble in Baltimore, but get most of our prints out of State, yes.

Q. What happens after you enter your ruling, what do you do with the actual prints, do you return them?

A. Yes, sir, in other words, there is a regular freight company that comes and picks them up.

Q. You send most of those prints back out of the State?

A. Sir, we don't cut any film, the film isn't ours by law; again I say we are not even allowed to touch a film, we recommend a cut, and they have to do their own cutting. I mean, in other words, it is not our film.

Q. I was concerned now mainly with the shipping of the [fol. 74] actual prints?

A. Well, of course, we have nothing whatsoever to do with that. In other words, you can bring it by bus, we have nothing to do at all with that.

Q. Mr. Mason, what about subsequent prints, do you censor prints other than the original print of a film?

A. If a print has an elimination in it we usually ask for the company to send us the particular reel or reels that we have eliminated to see that that has been done in the duplicates.

Q. But there is no requirement that subsequent prints be submitted to your Board with an additional fee, is there?

A. The original picture is $3.00 per thousand feet or fraction thereof, your duplicate is $1.00 per thousand or fraction thereof. That same thing would apply if it is to be cut or not to be cut, the price wouldn't change. Is that what you mean?

Q. That was one of the questions I had in mind.

A. Yes, sir. Well, in other words, the price wouldn't [fol. 75] change if it was eliminated or not eliminated.

Q. Mr. Mason, on the review, on the review procedure, I am referring now to the procedure which takes place after you have had a first ruling; and, then, the owner has appealed that, from that ruling, to the Board, do you judge the films by the same standards that you have judged them before?

A. Generally speaking I would say that would be right. Generally speaking, I mean, we are not infallible, I mean, we, if we are shown that maybe we have been a little harsh on the film, we will be glad to entertain anybody's thoughts on it, interest in the picture; anybody's thoughts, interest in the picture.

Q. Do you know, Mr. Mason, how many states have censorship?

A. Yes, sir.

Q. How many?

A. Four, sir, and many, many cities, many cities.

Q. Does Washington have censorship?

[fol. 76] A. No, not to my knowledge.

Q. You think there is a different standard of morality in Washington than there is in Baltimore?

Mr. Freeze: I object.

The Court: Sustained.

Mr. Bilgrey: We have no further questions.

Mr. Freeze: Your Honor, I will again renew my objection to the entire line of testimony of Mr. Mason's questioning and ask that it be stricken from the record.

The Court: Very well. I will deny your motion. Step down, Mr. Mason.

Mr. Whiteford: Miss Shecter.

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Thereupon: Mrs. Louis E. Shecter, being a witness of lawful age, having been first duly sworn according to law, was examined, and testified as follows:

By the Clerk:

Q. State your name and assignment?

A. Mrs. Louis E. Shecter, Vice-Chairman of the Motion [fol. 77] Picture Censor Board.

Direct examination.

By Mr. Whiteford:

Q. Miss Shecter, where do you live?

A. 3526 Barton Oaks Road.

Q. How long have you been associated with the Maryland State Board of Censors?

A. Two years.

Q. And your official position is vice-chairman?

A. Vice-Chairman.

Q. And have you been vice-chairman ever since you have been associated with the Board?

A. Two years, yes.

Q. For the full two years?

A. Yes.

Q. Your position is an appointive one, is that correct?

A. Appointed by Governor Tawes.

Q. Appointed by Governor Tawes. Miss Shecter, do you have any personal knowledge of whether or not a film submitted to the Board, without tendering of the required [fol. 78] fee, would be examined by the Board?

A. It is against the law. The law as set forth, states that the fee must be paid before the reviewing takes place.

Q. I understand, then, by your answer that since the law provides that a fee should be tendered that if it were not tendered the film would not be examined, is that correct?

A. Yes, sir.

The Court: Gentlemen, we are perfectly clear on that, unless you pay your money you can't have your film reviewed, no use going over that with every witness, that is clear to me. Go ahead, now, Mr. Whiteford.

By Mr. Whiteford:

Q. Miss Shecter, it is also true, is it not, that under the Act no newsreel is subject to censorship, is that correct?

A. Yes.

Mr. Freeze: Your Honor, I will again renew all objections, to this previous witness too, other than the case at point, and ask for a continuing objection to all the [fol. 79] testimony.

The Court: Very well, I will overrule the objection. You may proceed, Mr. Whiteford.

By Mr. Whiteford:

Q. It is further true, is it not, that no film shown on television in the State of Maryland is subject to censorship by the Maryland Board of Censors?

A. That goes under the FCC, Federal Communications.
Q. The answer, then, is no?
A. No television.

The Court: No censorship of television shows, that is also clear and I am sure it could be stipulated.

By Mr. Whiteford:

Q. And, Mrs. Shecter, it is also true, is it not, that the Maryland State Board of Censors does not review any film that is shown for a purely educational purpose in a non-commercial house, is that true?
A. Yes.
Q. And that the Maryland State Board of Censors does [fol. 80] not review any film for non-commercial purpose shown by a charitable or a fraternal or religious organization?
A. Yes.
Q. And, further that the Maryland State Board of Censors does not review any films shown for non-commercial purpose in a museum or a public library or a public school or a private school?
A. Yes.
Q. In the State of Maryland. Miss Shecter, are you familiar with the Section 6 of the Censorship Law of the State of Maryland, that is the section which has the various standards set out in it?
A. Yes.
Q. You are familiar with those standards?
A. Yes.
Q. Miss Shecter, I want to refer you particularly to Section 6 A, sub-section C and a portion of that which reads: in relation to the—I will read the whole section:
For the purposes of this Article, a motion picture film [fol. 81] or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable, or proper patterns of behavior.
Are you familiar with that standard set out in the Act?

A. I am.

Q. Have you in your capacity as vice-chairman of the Maryland Censorship Board ever censored a film with that particular standard in mind?

A. I have.

Q. Are you aware that the exact phraseology of that standard was declared unconstitutional by the Supreme Court several years ago?

A. That is not altogether correct. The way I understand it, I may not be altogether correct either, but the way I understand it each picture was a separate entity [fol. 82] unto itself and not every picture may be shown with every immoral act, but it was referring to Lady Chatterley's Lover, or one particular film, but that did not make it right for every immoral picture to be shown.

Q. Mrs. Shecter, have you read the Supreme Court opinion in Kingsley International Picture Corporation versus Regents of New York which is found in 360 U. S. at page 689?

A. No, I have not.

Q. No, not having read the opinion, then, you don't know what the Supreme Court said in this case?

A. I know the ruling that we were familiarized with in our office on Lady Chatterley's Lover.

Q. Did that ruling set out that these very words, which are immoral and that they portray acts of sexual immorality as desirable, acceptable or proper patterns of behavior, were declared unconstitutional and unenforcible?

A. If the acts of immoral behavior were glamorized or glorified it was still within our rights not to permit them [fol. 83] to pass.

Q. That is your interpretation, is that correct?

A. That is my interpretation, yes.

Q. And, thus, you still censor films in the State of Maryland based on that particular standard?

A. I did not understand your question.

Q. You thus base your censorship of films in the State of Maryland based on the standard which I just read, is that correct?

A. Not all of the films, no. We censor obscenity, we censor for other types of immorali[illegible] we censor for nudeness, or exposure, or pubic exposure, or breast exposure.

Q. Miss Shecter, let me get nudeness, what standards do you apply to nudeness in motion picture films?

A. There isn't an overall standard, are you referring to any particular film?

Q. I am referring to what standard, if any, you have in regard to nudity in a motion picture film?

A. We do not pass pubic nudity, we do not pass breast [fol. 84] exposures.

Q. Now, Miss Shecter, let me review for a moment, are you saying that the Maryland Board, State Censors, does not pass breast exposure?

A. In a nudist camp film there was a ruling on a documentary, The Naked Amazon, in which we were ruled to permit this breast exposure to pass, and because of that ruling we had to permit nudist camp films to pass with breast exposures.

Q. Would it be correct, then, if I said the Maryland State Board of Censors allow breast exposures in a film situated in a nudist camp?

A. If it confirms that there is a nudist camp in the film.

Q. And if that same identical view did not confirm that the exposure took place in a nudist camp, the Maryland State Board of Censors would order that particular view deleted, is that correct?

A. Yes.

Q. And the case that you refer to, having read the case, the Time Films versus the Maryland State Board of Cen- [fol. 85] sors, which you refer to as the case in which the State permits breast exposure in nudist colonies?

A. I don't know what you are referring to.

Q. I don't blame you, it wasn't a very good question, Miss Shecter.

Miss Shecter, you referred to a case that was decided by the Maryland Court of Appeals which led to the Censor Board's allowance of breast exposure in nudist camps. Do you know the name of that case?

A. No, I don't. I think the film that is—as close as I can recall, the film was The Naked Amazon, the name of the film, but who brought it to court I don't know.

Q. Now, did you ever see the film Naked Amazon?

A. It came into the office before I was on the Board.

Q. I take it, then, your answer is no?

A. Yes.

Q. Have you read the opinion of the Maryland Court of Appeals in regard to the film Naked Amazon?

[fol. 86] A. I did a while back, I don't know if I am familiar with it now.

Q. Is it your opinion that this particular opinion of the Maryland Court of Appeals allows breast exposure in nudist camps on motion picture screens, but nowhere else?

Mr. Freeze: Objection.

The Court: Well, we have gone this far, let her answer if she can. Overruled.

Mr. Freeze: I think she indicated she wasn't familiar with the case now.

The Court: Well—

Mr. Whiteford: Your Honor, I will let her—.

The Court: All right, let her answer.

Mr. Whiteford: If she is not familiar with it I don't want to press her.

The Court: Are you familiar with it?

Witness: No, I am not familiar with it.

The Court: She is not.

By Mr. Whiteford:

Q. Miss Shecter, when evaluating a film in regard to [fol. 87] whether or not it is obscene, what standard do you apply as to the word obscenity?

A. I think my discretion for good taste would take care of that, I don't think I could pinpoint the act of immorality in every picture that comes into the office, which ones are more obscene than others. We have to use our discretion and good taste.

Q. And would it be correct to say that if a particular scene or view offended your sense of discretion or good taste, you would, therefore, then consider that particular scene or view objectionable and censorable?

A. You are not speaking of my personal opinion, you are speaking as my official censor?

Q. Yes.

A. Well, there is a big difference; whereas I would not consider personally some of the sequences discretionary, as a board member I would have to pass them because of previous rules.

Q. Now, Miss Shecter, you are aware, are you not, that the Maryland Censorship statute purports to allow censor-
[fol. 88] ship of a scene or view or a movie that would tend to incite to crime. What standard do you apply to inciting to crime, in your capacity as a censor, not in your personal feelings?

A. Well, as a censor it is hard to say, there is no statistics to say that the boy saw a movie and then went out and raped someone; or, this boy saw an exposure and then went out and exposed someone. By the same token, I don't think it would do an adolescent or even a grown man any good to be incited sexually by an entertainment; that is not the purpose of movies to excite anybody sexually.

Q. Miss Shecter, could you apply discretionary standards as a censor?

A. That is right.

Q. In regard to this particular inciting to crime?

A. That is right.

Q. That is the same sort of discretionary standard that you apply in regard to obscenity as a censor?

[fol. 89] A. That is right.

Q. And I would assume that you also apply a discretionary standard to the provision of the Maryland Code which provides that a film may be censored if it would tend to debase or corrupt morals, is that correct?

A. Repeat that again, please.

(Question read.)

A. That is correct.

Q. Miss Shecter, in your opinion as a censor, is nudity on a motion picture screen censorable?

A. What form of nudity and how much nudity do you refer to? If say breast exposure outside of a nudist camp, I would vote for the deletion.

Q. Would that same scene, if it were published in a magazine, in your opinion be worthy of censorship?

A. We don't censor magazines.

Q. Do you think they should be censored?

Mr. Freeze: Objection.

The Court: Sustained.

By Mr. Whiteford:

[fol. 90] Q. Miss Shecter, are you a sculptress?

A. Yes, I am.

The Court: Are you what?

Mr. Whiteford: A sculptress.

The Court: Yes, all right, she is a sculptress, that is fine.

Mr. Whiteford: And she is a very fine one, Your Honor, I might add.

The Court: I understand she is.

By Mr. Whiteford:

Q. In your vocation as a sculptress you, on occasion, have won prizes, haven't you, for females in the nude?

A. One prize.

Mr. Freeze: Objection. Objection.

The Court: Now, let's keep this on a serious vein now, Mr. Whiteford. What is the question so we can get right to it.

Mr. Whiteford: The specific question asked?

The Court: Yes, let's get to the specific question. You [fol. 91] mean, has she sculptured nude models and I suppose she has.

Mr. Whiteford: Your Honor, not only that, she has—not only that but she has won prizes for it.

The Court: I think she is very proud of it and—

Mr. Whiteford: I would be very proud if I could do it, and I am not criticizing her for it.

The Court: That is not going to help me in this case.

Mr. Freeze: There was an objection.

The Court: I will overrule it.

By Mr. Whiteford:

Q. Miss Shecter, needless to say, you did not consider that creation of yours obscene, did you?

Mr. Freeze: Objection.

The Court: Sustained.

Mr. Whiteford: No further questions.

Mr. Freeze: The State will again renew its objection to the entire line of questioning of Miss Shecter other than the name and address and the fact she is a board member [fol. 92] and renews its objection.

The Court: I will overrule the objection. You may step down.

Mr. Whiteford: Miss Avara in the courtroom?

The Court: I believe not, he said she was at a funeral.

Mr. Freeze: Yes, Your Honor, Miss Avara, a member of the censor board, is at a funeral today and could not be in court.

The State is willing to stipulate that her testimony would follow that of the two other members of the Board; and, that they follow the Maryland statute in light of the Supreme Court decisions.

Mr. Whiteford: Your Honor, we will accept the stipulation that Miss Avara would testify that in applying the standards of this Act that she applies discretionary standards.

Mr. Freeze: Well, there was testimony from the first witness, Your Honor, I think, as to discretionary standards [fol. 93] but would testify that she would follow the Maryland Act in the light of the Supreme Court decisions.

Mr. Whiteford: Your Honor, I believe the effect of the witness, the first witness' testimony—

The Court: I don't want to interrupt this, apparently you can't enter into a stipulation. So, we will have to have Mrs. Avara's testimony, as I see it.

Mr. Freeze: All right, you want a third member of the Board?

Mr. Whiteford: I can't stipulate, Mr. Freeze, that Mrs. Avara—

Mr. Freeze: I don't know what Mrs. Avara would say other than what the other witnesses have said; but be glad to stipulate she is a member of the Board and would apply the Maryland Act as codified under 66 A Sections 1, up until the one pertaining to the motion picture act; over and above that I cannot speak for Mrs. Avara.

Mr. Whiteford: I can't accept that stipulation.

The Court: Then we can't go on, we will have to wait until Mrs. Avara is available; and, you have a right to call [fol. 94] her as a witness.

Mr. Whiteford: Your Honor, in view of the stipulation we would not call her; we do not want to hold up the proceedings any longer.

OFFER IN EVIDENCE

Like to offer in evidence House Bill #432 that Mr. Gebhart so kindly provided.

The Court: All right.

(Thereupon the above-mentioned bill was then marked Defendant's Exhibit Number 5.)

The Court: Any other testimony, Mr. Whiteford?

Mr. Whiteford: That is all our questions. The defendant closes their case, Your Honor.

The Court: Very well. Any additional testimony on the part of the State?

Mr. Freeze: No, no rebuttal, Your Honor.

Mr. Whiteford: Your Honor, at this time the Defendant offers a motion for a judgment of acquittal. It is incorrectly titled on the paper which I am about to pass you, by acquittal. But, it is our motion, is that for a judgment of acquittal.

[fol. 95] I would also like to state, for the purpose of the record, that the many reasons enumerated in this motion are not the only reasons which we are basing this motion upon. And that there are others that, because of time and space, all involving basic constitutional issues, that we have not enumerated and we do not intend to restrict ourselves to the specific reasons enumerated in the motion.

The Court: May I see counsel in this case, please.

(Bench Conference; Bench Conference terminated.)

BOTH SIDES REST

The Court: Gentlemen, just to make the record perfectly clear, both sides have rested; and, the defendant has filed a motion for a judgment by acquittal and I am holding the decision on that judgment sub curia pending the filing on behalf of both the defendant and the State a memorandum which I will consider and thereafter decide this case.

Mr. Whiteford: Thank you, sir.

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[fol. 96]

IN THE CRIMINAL COURT OF BALTIMORE

MOTION FOR JUDGMENT BY ACQUITTAL—
Filed March 19, 1963

Now comes Ronald L. Freedman, Defendant, and moves for Judgment of Acquittal and as reason therefore says:

1. That Article 66A upon its face violates the First and Fourteenth Amendments of the United States Constitution in that the said Article imposes an invalid infringement upon the exercise of the right of free speech and press.

2. That Article 66A upon its face violates Article 40 of the Maryland Declaration of Rights in that it imposes an infringement upon the exercise of the right of free speech and press.

3. That Article 66A is invalid as contrary to the Due Process Clause of the Fourteenth Amendment in that the standards pursuant to which speech is abridged set forth in, more specifically, Section 6 of the said Article, are vague and in that these standards fail to advise defendant of those forms of speech which the state purportedly proscribes.

4. That Article 66A is invalid as contrary to the Due Process Clause of Article 23 of the Declaration of Rights of Maryland in that the standards contained in Section 6 thereof which permit the depriving of defendant's life, liberty or property are couched in vague language which fail to apprise defendant of the conduct the statute seeks to proscribe.

5. That Article 66A is so vague and indefinite in form that it can be interpreted as to permit within the scope of its language the banning of incidents fairly within the pro- [fol. 97] tection or guarantee of freedom of speech and press and is therefore void as contrary to the Fourteenth Amendment of the United States Constitution and as contrary to the terms of the Maryland Constitution.

6. That Article 66A is invalid if it is so construed and implied to deny to the defendant the exercise of his rights to free speech and press contrary to the United States Constitution and the Maryland Declaration of Rights.

7. That Article 66A is invalid as contrary to and imposes an unlawful infringement upon the Inter-State Commerce Clause of the United States Constitution.

8. That Article 66A is invalid in that it imposes a tax and/or a license fee upon the right of the freedoms of speech and press and is thus contrary to the First and Fourteenth Amendments of the United States Constitution and of Article 40 of the Maryland Declaration of Rights.

9. That Article 66A is invalid and void in that it is an unlawful and illegal delegation of legislative authority to an administrative agency.

10. That Article 66A is invalid in that it acts as a denial of due process in contravention of the United States and Maryland Constitutions in that it allows an administrative board to unlawfully usurp the judicial function.

11. And for other such good and valid reasons that may be argued.

EXHIBITOR'S COPY
Printed in U. S. A.

STATE'S EXHIBIT No. 1-A

[fol. 98]

# TIMES FILM CORPORATION

144 WEST 57th STREET, NEW YORK 19, N. Y.
*Telephone:* PLaza 7-6980

20. The following schedule and all the written and printed parts thereof are part of this agreement.

| THEATRE | TOWN AND STATE |
|---|---|
| REX | Baltimore, Maryland |

PICTURES:

REVENGE AT DAYBREAK

RUN:

Maryland Premiere beginning November 1st, 1962

RENTAL:

30%

ADDITIONAL PROVISIONS:

advertising to be determined mutually, all advertising off the top.

IN WITNESS WHEREOF.....the Exhibitor, operating the Rex Theatre, located at No.....Street.....City Baltimore State Maryland, on Nov. 1st duly executed this application, which upon written acceptance by Distributor in the space to the left provided below shall be deemed to be a limited and non-exclusive license to said Exhibitor to exhibit the motion picture specified in the schedule in accordance with the terms and conditions above and on the back hereof.

TIMES FILM CORPORATION

Baltimore Film Society, Inc.

**REVENGE AT DAYBREAK**

RUN:

**Maryland Premiere beginning November 1st, 1962**

RENTAL:

**30%**

ADDITIONAL PROVISIONS:

**advertising to be determined mutually, all advertising off the top.**

IN WITNESS WHEREOF.....the Exhibitor, operating the **Rex** Theatre, located at No.....Street.....City **Baltimore** State **Maryland** as on **Nov. 1st**

duly executed this application, which upon written acceptance by Distributor in the space to the left provided below shall be deemed to be a limited and non-exclusive license to said Exhibitor to exhibit the motion picture specified in the schedule in accordance with the terms and conditions above and on the back hereof.

TIMES FILM CORPORATION

.....L. S.
Salesman

COUNTERSIGNED
at
APPROVED Date.....19.....
TIMES FILM CORPORATION

By.....L. S.
Sales Director

Baltimore Film Society, Inc.
Exhibitor

By Ronald L. Freedman L. S.
Partner General Manager Officer Individual (Strike out three)

As an inducement to the Distributor to execute this license agreement, and in consideration thereof the undersigned hereby personally guarantees the performance of the terms of this agreement and the payment of any rental, damages and other sums of money provided for herein.

.....L. S.

## LICENSE AGREEMENT

**AGREEMENT** made between **TIMES FILM CORPORATION**, hereinafter referred to as Distributor, the Exhibitor named in the Schedule and the person signing on Exhibitor's behalf:

1. **LICENSE** — Distributor grants to Exhibitor and Exhibitor hereby accepts a limited license to exhibit publicly the motion picture designed in the Schedule (hereinafter referred to as the "Picture") at only the particular theatre designated in the Schedule (hereinafter referred to as the "Theatre") for the number of consecutive days and particular days of the week specified in the Schedule and for no other use or purpose. This license shall include a license under all copyrights owned or controlled by Distributor to such picture and the recorded sound in synchronism therewith but not the right to perform in public any musical work included in such recorded sound the right of public performance of which is not owned or controlled by Distributor or licensed to Distributor with the right to grant sublicenses. Exhibitor agrees to exhibit said picture as provided in this agreement and pay the license fees specified in the Schedule.

2. **PAYMENT** — If the license fee is based upon a percentage of Exhibitor's gross receipts, Exhibitor agrees to account to Distributor for each person admitted on the basis of the respective admission prices in effect (collected, advertised or posted at the box office, whichever is highest) at the theatre at each performance during the entire engagement of the picture. Admission taxes collected may be deducted before computing Distributor's share. Exhibitor agrees to furnish immediately after

the end of the engagement a box office statement showing the number of admissions at the respective prices charged at each performance on forms furnished by Distributor. This statement shall be signed by Exhibitor's cashier and countersigned by the Exhibitor or by the theatre manager. Distributor shall have full right to check the sale of tickets and the receipts therefrom, including free access to all parts of the theatre and the right to examine ticket machines, tickets, stubs, books and records, and the right to audit at any time. All fixed or guaranteed license fees shall be payable at least three days in advance of the date of delivery of a print of the picture to the theatre. License fees based upon a percentage of receipts shall be payable immediately after the last exhibition of the picture at the theatre or if so requested by Distributor at the end of each day's exhibition. Distributor may C. O. D. for any indebtedness of Exhibitor to Distributor under this and any other agreement.

3. DAMAGES — FAILURE TO EXHIBIT — If Exhibitor fails or refuses to exhibit the picture as herein provided, Exhibitor shall pay to Distributor as liquidated damages for each day it should have exhibited the picture a sum equal to the percentage specified in the Schedule of the theatre's average daily gross receipts during the exhibition thereat of any other pictures. If no other pictures have been exhibited the average to be used shall be the theatre's gross receipts on Distributor's percentage pictures during the 90 days prior to the date of such failure or refusal. If none of Distributor's pictures were exhibited during such period on percentage terms the average to be used shall be twice the theatre's daily gross receipts during the 30 operating days prior to the day of such failure or refusal. If any fixed or guaranteed sums are provided in the Schedule, they shall also be payable to Distributor as liquidated damages in the same manner as if the picture had played and produced gross receipts calculated as provided above.

4. PRINTS — Distributor agrees to deliver a print of the picture suitable for exhibition when used with appropriate equipment to Exhibitor or Exhibitor's agent at Distributor's exchange, or to a common carrier designated by Exhibitor, and acceptable to Distributor or to the postal authorities for mailing. Exhibitor agrees to return each print and the reels and containers thereof to Distributor's exchange in the same condition as when received, reasonable wear and tear due to proper use excepted, immediately after the last exhibition and to pay transportation charges both ways, except if directed to ship elsewhere than to Distributor's exchange, Exhibitor shall so ship, transportation charges collect. Exhibitor agrees to pay to Distributor the cost of replacement of any print or part of any print, or any reels or containers lost, stolen, destroyed or damaged between delivery by Distributor and return by Exhibitor.

5. SELECTION OF PLAY DATES — Unless definitely specified or otherwise agreed upon or provided in the Schedule, the exhibition date of the picture shall be determined as follows:

Subject to prior runs and clearance heretofore or hereafter granted other exhibitors, to the general release of the picture in the exchange territory and to the availability of a print suitable for use with the type of sound equipment installed at the theatre, Distributor shall mail written notice of the date the picture will be available to Exhibitor. Within fourteen days after such mailing, Exhibitor shall select and notify Distributor in writing of the exhibition date which shall commence within 30 days after the available date. If such date or dates are acceptable to Distributor it shall confirm the same. If the date Exhibitor so selects shall not be acceptable to Distributor or shall have been assigned to another exhibitor, or if no print shall be available for such date, Exhibitor shall forthwith select another date falling within said period. Upon failure of Exhibitor to select a play date as herein specified, Distributor may designate same by mailed notice. If Exhibitor shall fail for any reason to exhibit the picture within 30 days of availability, the clearance, if any, herein granted is waived by Exhibitor.

6. CLEARANCE AND RUN — Unless otherwise provided, clearance is to be computed from the last license date of exhibition. Distributor agrees not to exhibit or license the exhibition of the picture at any other theatres specified in the Schedule provided they are in substantial competition with the licensed theatre prior to the expiration of the clearance period, if any, specified in the Schedule. The damages which may be awarded for any violation hereof shall not exceed the amount of the license fee, and such claim for damages as limited above shall be Exhibitor's sole and exclusive remedy on account of any such violation. The "trade showing," "trend showing," "tryout," "preview," "midnight show" or "pre-release" of the picture shall not be deemed either a run of the picture, a general release of the picture or in conflict with any license granted hereunder.

If the run licensed hereunder is not a first run Distributor may license the picture as a continued prior run, either at the theatre where the picture is exhibited as a prior run or at another theatre immediately after the prior run without any days intervening. Exhibitor's availability of any pictures exhibited on a continued prior run shall be postponed and any clearance granted the theatre exhibiting such continued prior run shall be extended for a period corresponding to the length of such continued prior run unless otherwise specified in the Schedule.

7. ADVERTISING — Exhibitor shall advertise and announce the licensed picture as "A Times Film Release." In all newspaper advertising and publicity issued by Exhibitor relating to the licensed picture Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by Distributor.

8. EXECUTION AND ACCEPTANCE — Until accepted in writing by Distributor in the space provided on reverse hereof and the return of an executed copy hereof to Exhibitor, this instrument and any other offers made by Exhibitor for the license of the picture for exhibition at the theatre shall be deemed only an application for a license for the picture to the theatre and may be withdrawn by Exhibitor or rejected by Distributor at any time before such acceptance. Acceptance by Distributor of any check or other consideration as payment for any purpose, any notice to Exhibitor of any acceptance or award with respect to any bid, or the delivery of a print of the picture to the theatre shall not be deemed an acceptance hereof or the licensing of the picture by Distributor.

If this instrument is signed on behalf of Exhibitor by any one other than Exhibitor, the person or entity so signing represents and warrants that he or it is authorized to sign this instrument on behalf of Exhibitor and agrees to be bound hereunder jointly and severally with Exhibitor.

9. CHANGES IN WRITING — This agreement is complete and all promises, representations, understandings, offers and agreements in reference thereto have been expressed herein. No change or modification hereof shall be binding upon the Distributor unless in writing signed by an officer or a person authorized by the Distributor.

10. ASSIGNMENT — This agreement shall not be assigned by either party without the written consent of the other except that Distributor may assign to a subsidiary or affiliate.

11. TAXES — Exhibitor shall pay to Distributor any and all taxes (or a sum equal thereto) duly imposed or hereafter duly imposed, levied or based upon the license, delivery, exhibition, possession or use by Exhibitor of the prints of the picture or upon the grant of this license or the exercise thereof or based upon or measured by the license fee or any part thereof, however determined, paid or payable by Exhibitor to Distributor under this agreement. The word "tax" as used in this paragraph shall be deemed to include but shall not be limited to taxes, fees, assessments, charges, imposts, levies, excises, however designated, whether ad valorem, gross income, gross receipts, storage, use, consumption, license, compensating, excise, privilege or other exaction. If the exact amount of any tax is not definitely fixed or cannot be exactly determined, Distributor may estimate the amount of such tax and Exhibitor shall pay to Distributor such estimated amount upon demand thereof. Upon final determination of the exact amount, Exhibitor shall be entitled to repayment of any amount paid in excess of the tax. Upon the failure or refusal of Exhibitor to pay any tax, Distributor shall have the same remedies as herein provided for default in payment of license fees in addition to the other remedies provided by law.

12. PREVENTION OF PERFORMANCE — If Exhibitor shall be prevented from exhibiting or Distributor from delivering the licensed picture, by reason of fire, strike, labor dispute, riot, insurrection, war, catastrophe, casualty, the public enemy, legal proceedings, rules and regulations of any governmental body or authority, act of God or the elements, and, without limiting the foregoing, any cause beyond the control of either party, the delivery of the picture hereunder shall be temporarily suspended for the time equal to the period performance is so prevented. Performance shall be resumed by the party so affected immediately after the removal or abatement of the cause of such interruption and the repair of any damage occasioned thereby. If such suspension of performance shall continue for a period of 10 days, this license in respect of such picture shall at Distributor's option at any time thereafter terminate and revert to Distributor without liability on the part of either party.

13. DEFAULTS — If Exhibitor shall fail or refuse to perform the terms and provisions of this or any other agreement, or any of them, or if Exhibitor becomes insolvent or is adjudicated a bankrupt, or executes an assignment for the benefit of creditors, or if a receiver or trustee is appointed for any of the property of Exhibitor, or if Exhibitor voluntarily or by operation of law should lose control of the said theatre or of his interest therein, or if an order is entered approving a petition filed by or against Exhibitor under the Bankruptcy Laws then, at any time after the happening of any one or more of said events, Distributor may at its option: (1) terminate this and any other license agreements, or (2) suspend the delivery of the picture hereunder until such default or defaults shall cease and be remedied. The exercise of either remedy by Distributor shall be in addition to and without prejudice to any right or remedy of Distributor against Exhibitor at law or in equity or otherwise provided for in this agreement.

14. CUTTING OR ALTERATION OF PRINTS — The Exhibitor shall exhibit each print in its entirety and shall not copy, duplicate, sub-rent or part with possession of any print. The Exhibitor shall not cut or alter any print, other than to make necessary repairs thereto, or when required by a duly constituted public official or authority.

15. TICKETS OF ADMISSION — When pictures are exhibited at a license fee based upon a percentage of the gross box office receipts, Exhibitor agrees that admission to the theatre shall be obtained only by the presentation of tickets purchased at the box office of the theatre excepting a reasonable number of passes. Exhibitor agrees all tickets shall be serially numbered consecutively in Arabic numbers from 1 up to 500,000. Series of tickets shall be distinguished by using as a prefix to the numbers letters of the alphabet in order starting with the letter "A". Not more than one series of tickets shall be used at any time and none shall be duplicated. Tickets shall bear the name of the theatre for which they are sold and the price of admission and all taxes. Tickets of different admission prices shall have separate and decidedly distinct colors. Only a reasonable number of free admissions consistent with good judgment and general current practices will be issued.

16. BREACH OF OTHER AGREEMENTS — If the Exhibitor shall breach any other agreement between the Exhibitor and Distributor made prior to, simultaneously with or subsequent to the making of this agreement, then any such breach under such agreement shall be deemed to be a breach and a default under this agreement and in any such case the Distributor shall have all the rights and remedies herein provided as well as those at Law, in Equity or otherwise, to the same full force and to the same extent as if such breach has been committed hereunder.

17. RIGHT TO C.O.D. — [illegible]

stolen, destroyed or damaged between delivery by Distributor and return by Exhibitor.

**5. SELECTION OF PLAY DATES** — Unless definitely specified or otherwise agreed upon or provided in the Schedule, the exhibition date of the picture shall be determined as follows:

Subject to prior runs and clearance heretofore or hereafter granted other exhibitors, to the general release of the picture in the exchange territory and to the availability of a print suitable for use with the type of sound equipment installed at the theatre, Distributor shall mail written notice of the date the picture will be available to Exhibitor. Within fourteen days after such mailing, Exhibitor shall select and notify Distributor in writing of the exhibition date which shall commence within 30 days after the available date. If such date or dates are acceptable to Distributor it shall confirm the same. If the date Exhibitor so selects shall not be acceptable to Distributor or shall have been assigned to another exhibitor, or if no print shall be available for such date, Exhibitor shall forthwith select another date falling within said period. Upon failure of Exhibitor to select a play date as herein specified, Distributor may designate same by mailed notice. If Exhibitor shall fail for any reason to exhibit the picture within 30 days of availability, the clearance, if any, hereby granted is waived by Exhibitor.

**6. CLEARANCE AND RUN** — Unless otherwise provided, clearance is to be computed from the last license date of exhibition. Distributor agrees not to exhibit or license the exhibition of the picture at any other theatres specified in the Schedule provided they are in substantial competition with the licensed theatre prior to the expiration of the clearance period, if any, specified in the Schedule. The damages which may be awarded for any violation hereof shall not exceed the amount of the license fee, and such claim for damages as limited above shall be Exhibitor's sole and exclusive remedy on account of any such violation. The "trade showing," "road showing," "tryout," "previews," "midnight show" or "pre-release" of the picture shall not be deemed either a run of the picture, a general release of the picture or in conflict with any license granted hereunder.

If the run licensed hereunder is not a first run Distributor may license the picture as a continued prior run, either at the theatre where the picture is exhibited as a prior run or at another theatre immediately after the prior run without any days intervening. Exhibitor's availability of any pictures exhibited on a continued prior run shall be postponed and any clearance granted the theatre exhibiting such continued prior run shall be extended for a period corresponding to the length of such continued prior run unless otherwise specified in the Schedule.

**7. ADVERTISING** — Exhibitor shall advertise and announce the licensed picture as "A Times Film Release." In all newspaper advertising and publicity issued by Exhibitor relating to the licensed picture Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by Distributor.

**8. EXECUTION AND ACCEPTANCE** — Until accepted in writing by Distributor in the space provided on reverse hereof and the return of an executed copy hereof to Exhibitor, this instrument and any other offers made by Exhibitor for the license of the picture for exhibition at the theatre shall be deemed only an application for a license for the picture to the theatre and may be withdrawn by Exhibitor or rejected by Distributor at any time before such acceptance. Acceptance by Distributor of any check or other consideration as payment for any purpose, any notice to Exhibitor of any acceptance or award with respect to any bid, or the delivery of a print of the picture to the theatre shall not be deemed an acceptance hereof or the licensing of the picture by Distributor.

If this instrument is signed on behalf of Exhibitor by any one other than Exhibitor, the person or entity so signing represents and warrants that he or it is authorized to sign this instrument on behalf of Exhibitor and agrees to be bound hereunder jointly and severally with Exhibitor.

**9. CHANGES IN WRITING** — This agreement is complete and all promises, representations, understandings, offers and agreements in reference thereto have been expressed herein. No change or modification hereof shall be binding upon the Distributor unless in writing signed by an officer of or a person authorized by the Distributor.

**10. ASSIGNMENT** — This agreement shall not be assigned by either party without the written consent of the other except that Distributor may assign to a subsidiary or affiliate.

**11. TAXES** — Exhibitor shall pay to Distributor any and all taxes (or a sum equal thereto) duly imposed or hereafter duly imposed, levied or based upon the license, delivery, exhibition, possession or use by Exhibitor of the prints of the picture or upon the grant of this license or the exercise thereof or based upon or measured by the license fee or any part thereof, however determined, paid or payable by Exhibitor to Distributor under this agreement. The word "tax" as used in this paragraph shall be deemed to include but shall not be limited to taxes, fees, assessments, charges, imposts, levies, excises, however designated, whether ad valorem, gross income, gross receipts, storage, use, consumption, license, compensating, excise, privilege or other exaction. If the exact amount of any tax is not definitely fixed or cannot be exactly determined, Distributor may estimate the amount of such tax and Exhibitor shall pay to Distributor such estimated amount upon demand thereof. Upon final determination of the exact amount, Exhibitor shall be entitled to repayment of any amount paid in excess of the tax. Upon the failure or refusal of Exhibitor to pay any tax, Distributor shall have the same remedies as herein provided for default in payment of license fees in addition to the other remedies provided by law.

**12. PREVENTION OF PERFORMANCE** — If Exhibitor shall be prevented from exhibiting or Distributor from delivering the licensed picture, by reason of fire, strike, labor dispute, riot, insurrection, war, catastrophe, casualty, the public enemy, legal proceedings, rules and regulations of any governmental body or authority, act of God or the elements, and, without limiting the foregoing, any cause beyond the control of either party, the delivery of the picture hereunder shall be temporarily suspended for the time equal to the period performance is so prevented. Performance shall be resumed by the party so affected immediately after the removal or abatement of the cause of such interruption and the repair of any damage occasioned thereby. If such suspension of performance shall continue for a period of 10 days, this license in respect of such picture shall at Distributor's option at any time thereafter terminate and revert to Distributor without liability on the part of either party.

**13. DEFAULTS** — If Exhibitor shall fail or refuse to perform the terms and provisions of this or any other agreement, or any of them, or if Exhibitor becomes insolvent or is adjudicated a bankrupt, or executes an assignment for the benefit of creditors, or if a receiver or trustee is appointed for any of the property of Exhibitor, or if Exhibitor voluntarily or by operation of law should lose control of the said theatre or of his interest therein, or if an order is entered approving a petition filed by or against Exhibitor under the Bankruptcy Laws then, at any time after the happening of any one or more of said events, Distributor may at its option: (1) terminate this and any other license agreements, or (2) suspend the delivery of the picture hereunder until such default or defaults shall cease and be remedied. The exercise of either remedy by Distributor shall be in addition to and without prejudice to any right or remedy of Distributor against Exhibitor at law or in equity or otherwise provided for in this agreement.

**14. CUTTING OR ALTERATION OF PRINTS** — The Exhibitor shall exhibit each print in its entirety and shall not copy, duplicate, sub-rent or part with possession of any print. The Exhibitor shall not cut or alter any print, other than to make necessary repairs thereto, or when required by a duly constituted public official or authority.

**15. TICKETS OF ADMISSION** — When pictures are exhibited at a license fee based upon a percentage of the gross box office receipts, Exhibitor agrees that admission to the theatre shall be obtained only by the presentation of tickets purchased at the box office of the theatre excepting a reasonable number of passes. Exhibitor agrees all tickets shall be serially numbered consecutively in Arabic numbers from 1 up to 500,000. Series of tickets shall be distinguished by using as a prefix to the numbers letters of the alphabet in order starting with the letter "A". Not more than one series of tickets shall be used at any time and none shall be duplicated. Tickets shall bear the name of the theatre for which they are sold and the price of admission and all taxes. Tickets of different admission prices shall have separate and decidedly distinct colors. Only a reasonable number of free admissions consistent with good judgment and general current practices will be issued.

**16. BREACH OF OTHER AGREEMENTS** — If the Exhibitor shall breach any other agreement between the Exhibitor and Distributor made prior to, simultaneously with or subsequent to the making of this agreement, then any such breach under such agreement shall be deemed to be a breach and a default under this agreement and in any such case the Distributor shall have all the rights and remedies herein provided as well as those at Law, in Equity or otherwise, to the same full force and to the same extent as if such breach has been committed hereunder.

**17. RIGHT TO C.O.D.** — It is agreed that the Distributor may at its option deliver to the Exhibitor C.O.D. the motion picture deliverable hereunder and may add to said C.O.D. the amount of any past indebtedness owing under this or any other agreement by the Exhibitor to the Distributor. Such indebtedness may include monies due from the Exhibitor to the Distributor for unplayed pictures, played pictures or for any other indebtedness whatsoever.

**18. MONIES IN TRUST** — Where this agreement calls for the payment of a fixed and definite rental for the said motion picture (that is to say, not based upon a percentage of the gross receipts) then in case payment is not made in advance of the exhibition of the motion picture licensed hereunder and credit is extended to the Exhibitor, in consideration thereof, the Exhibitor agrees that the Distributor shall receive its rental for the said motion picture if credit has been so extended, out of the first admission receipts from the patrons paying admission during the exhibition of such motion picture up to the amount due the Distributor and such admission receipts shall belong to and be the property of the Distributor when they are paid by the patrons and shall be held in trust for the Distributor until paid to the Distributor and the ownership of said trust fund by the Distributor shall not be questioned whether the monies are physically segregated or not and the Exhibitor agrees to keep such portion of the gross receipts as are payable to the Distributor hereunder, in a separate and distinct fund. In the event the admission fees received during the exhibition of said motion picture are not equal to the amount of the license fee and/or rental due to the Distributor on account of such motion picture, the Exhibitor shall nevertheless remain and continue to be liable for the balance of the amount due and payable to the Distributor after the monies kept in trust for the Distributor shall have been paid to the Distributor.

**19. SPECIAL PROVISIONS** — This license is limited to the right to exhibit the picture at the theatre and only for the number of days and on the exhibition dates booked by Exhibitor and confirmed by Distributor in writing. This license includes no right of exhibition by means of any prints other than those furnished Exhibitor by Distributor for the express purpose of exhibition on the dates so confirmed for the designated theatre. Exhibitions between midnight and 6:00 A.M. are not permitted unless otherwise stated in the Schedule.

DEFENDANT'S EXHIBIT No. 1

# Rules Adopted by the Maryland State Board of Motion Picture Censors

In pursuance of Section 16 of the Act of 1922, Chapter 390 (As amended by the Acts of the General Assembly of Maryland of 1927, 1929, 1939, 1941, 1945, 1947, 1955 and 1960.)

1. All persons desiring to submit films or views to the Board for examination must fill out the application blanks provided by the Board, giving title, date of release, number of reels, number of feet, whether original or duplicate, character of film, whether comedy or drama, news, etc., and name of manufacturer. Applications must be signed by an authorized agent or representative of the owner or lessee of the films or views to be examined.

2. Applications must be accompanied by a check or cash covering full amount of censorship fee, and no films or views will be examined unless paid for in advance.

3. All applications for the examination of duplicate prints must be made by the original applicant within one year, otherwise they will be treated as originals and the full censorship fee of $3.00 charged for one thousand feet or less (instead of $1.00) where the film averages sixteen (16) frames or less to the foot; and a fee of $4.00 charged for one thousand feet or less (instead of $2.00) where the film averages more than sixteen (16) frames to the foot, as provided in the law for duplicates.

4. "Reels must be delivered to the Board at least 72 hours in advance of the date for their release in this State — Saturdays, Sundays and holidays not to be included. Reels will be examined by the Board within 48 hours after they are delivered to it, if possible, and will be available for the applicant's repossession the day following examination or on the same day thereof, if practicable.

5. All reels will be examined by the Board in the order in which they are received. Exception to this rule will be made only when application and fee have been received in advance

and a definite appointment has been made with the Board by the exchange manager or agent for the examination of a film.

6. Substitute seals to replace approval seals lost or destroyed will be supplied on censored prints, to exchange managers, agents and other duly authorized persons, if applications are made on form provided for the purpose, giving title and serial number of film for which a new seal is desired and upon furnishing proof to the satisfaction of the Board, that the said print is the original censored print, and that all eliminations ordered, if any, are duly made and if perforations are missing, the Board at its discretion, may require a witten statement or an affidavit to the effect that the said print is the original censored print and all eliminations ordered, if any, have been duly made. In the above case the Board, at its discretion, will reperforate such prints free of charge. In case a censored print has been lost or destroyed, upon affidavit to that effect, made on form provided for the purpose, within a period of ninety (90) days, after filing of original application for censorship, the Board, at its descretion, will perforate and issue seal on such print the same as on prints originally censored. Substitute seals will not be issued on any subject after a period of two (2) years has elapsed since the filing of original application for censorship, unless perforations are on film at the time.

7. Substitute seals for use in the above case will be supplied under the conditions specified at a cost of $1.00 each. The Board will replace perforations. at its discretion. free of charge.

8. All films or views must be presented to the Board as originally produced unless otherwise specified on the application. In case the print submitted has been subject to eliminations or changes prior to examination, a list of the same must accompany the application, and the approval seal will be issued for the film as presented.

9. Title of subject, name of manufacturer, and number of parts, as stated on application, must correspond to title, name of manufacturer and number of parts shown on screen.

10. Any change of title, or any alteration or addition made to any film or view after it has been examined by the Board,

[fol. 102]

must be submitted in writing for the approval of the Board, and if the changes meet with the Board's approval, it will issue an order to this effect.

11. No film or view shall be approved by the Board unless and until the person applying for such approval shall agree in writing to any eliminations which shall have been made by the Board, and shall certify in writing to the Board that such eliminations have been made, and shall further agree in writing that all scenes and titles condemned in film will be eliminated from all banners, posters, or other like advertising matter. Appeals from any order of the Board must be taken within ninety (90) days of receipt of notice of such order. After this period the Board will refuse to reexamine any film except upon payment of censorship fee of $3.00 for one thousand feet or less where the film averages sixteen (16) frames or less to the foot; and a fee of $4.00 for one thousand feet or less where the film averages more than sixteen (16) frames to the foot.

12. All trailers used as advance advertisments of uncensored films must be submitted to the Board before being exhibited in public. Trailers containing scenes approved in films are permitted. Trailers which are duplicates of censored and approved trailers need not be submitted for censorship.

13. The Board requires that all dialogue used in films, whether in English or in foreign language, together with a list of printed subtitles contained in any film, be submitted when the application for approval is made.

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DEFENDANT'S EXHIBIT No. 5

# Forty-fourth Annual Report

# MARYLAND STATE BOARD

# OF

# MOTION PICTURE CENSORS


**Offices**
**State Office Building**
**301 W. Preston Street**
**Baltimore 1, Maryland**

• • • • •

# MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

## For the Fiscal Year Ended June 30, 1960

### RECEIPTS

| | | | |
|---|---|---|---|
| **FEES:** | | | |
| Original Reels—35MM (5,342,456 ft.) | $17,481.00 | | |
| Original Reels—16MM (9,297 ft.) | 48.00 | | |
| | | $17,529.00 | |
| Duplicate Reels—35MM (47,120,231 ft.) | $50,480.00 | | |
| Duplicate Reels—16MM | | | |
| | | $50,480.00 | |
| Sale of Substitute Seals (1266) | | 1,266.00 | |
| | | | $69,275.00 |
| ADD: Credits (C&P Tel. Co. & Sale State Car) | | | 499.84 |
| Deposited to Credit of State Treasurer | | | $69,774.84 |

### EXPENSES

| | | | |
|---|---|---|---|
| **SALARIES:** | | | |
| Board Members | $ 9,231.22 | | |
| Other Employees | $39,999.70 | | |
| | | $49,230.92 | |
| **OTHER EXPENSES:** | | | |
| Communication | $1,149.10 | | |
| Contractural Services, Office | 247.82 | | |
| Printing | 304.00 | | |
| Office Supplies | 639.41 | | |
| Office Equipment, Additional | 73.25 | | |
| Insurance and Bonds | 42.50 | | |
| Contractural Services, Motion Picture | 2,031.76 | | |
| Motion Picture Machine Supplies | 146.68 | | |
| Motion Picture Equipment, Additional | 138.60 | | |
| Technical and Special Fees | 5,750.00 | | |
| Travel | 606.70 | | |
| Motor Vehicle Operation & Maintenance | 359.36 | | |
| Motor Vehicle Equipment | 1,710.11 | | |
| | | $13,199.29 | |
| | | | $62,430.21 |

### BUDGET ACCOUNT (Per Comptroller)

| | | | |
|---|---|---|---|
| Appropriations, 1960 | $62,833.00 | | |
| Add: Credits (C&P Tel. Co. & Sale State Car) | 499.84 | | |
| | | $63,332.84 | |
| Less Reversion to Reserve Fund | | 902.63 | $62,430.21 |
| General Fund Disbursement | | | $62,430.21 |

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# MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

## TABLE SHOWING TOTAL ANNUAL RECEIPTS AND DISBURSEMENTS TOGETHER WITH THE AMOUNTS REVERTING TO THE STATE TREASURY

### October 1, 1920-June 30, 1960

| | Receipts | Disbursements | Amount Reverting to State Treasury |
|---|---|---|---|
| 10-1-20 to 9-30-21 | $26,488.33 | $19,025.26 | $7,463.07 |
| 10-1-21 to 9-30-22 | 26,866.90 | 19,842.12 | 7,024.78 |
| 10-1-22 to 9-30-23 | 27,059.51 | 19,892.93 | 7,166.58 |
| 10-1-23 to 9-30-24 | 26,338.50 | 20,730.44 | 5,608.06 |
| 10-1-24 to 9-30-25 | 29,249.50 | 22,207.24 | 7,042.26 |
| 10-1-25 to 9-30-26 | 30,207.92 | 22,662.82 | 7,545.10 |
| 10-1-26 to 9-30-27 | 32,498.55 | 24,883.80 | 7,614.75 |
| 10-1-27 to 9-30-28 | 38,165.57 | 27,734.69 | 10,430.88 |
| 10-1-28 to 9-30-29 | 44,486.27 | 32,937.76 | 11,548.51 |
| 10-1-29 to 9-30-30 | 38,954.98 | 31,718.26 | 7,236.72 |
| 10-1-30 to 9-30-31 | 35,245.85 | 31,816.79 | 3,429.06 |
| 10-1-31 to 9-30-32 | 35,637.44 | 32,158.81 | 3,478.63 |
| 10-1-32 to 9-30-33 | 35,152.34 | 34,207.93 | 944.41 |
| 10-1-33 to 9-30-34 | 36,563.00 | 37,174.49 | 9,388.51 |
| 10-1-34 to 9-30-35 | 39,463.00 | 27,577.76 | 11,885.24 |
| 10-1-35 to 9-30-36 | 44,073.00 | 28,927.98 | 15,145.02 |
| 10-1-36 to 9-30-37 | 49,293.00 | 28,855.10 | 20,437.90 |
| 10-1-37 to 9-30-38 | 48,659.00 | 30,197.34 | 18,461.66 |
| 10-1-38 to 9-30-39 | 50,180.00 | 30,302.92 | 19,877.08 |
| 10-1-39 to 9-30-40 | 53,180.00 | 29,598.72 | 23,581.28 |
| 10-1-40 to 9-30-41 | 55,877.00 | 30,347.18 | 25,529.82 |
| 10-1-41 to 9-30-42 | 55,561.00 | 31,135.92 | 24,425.08 |
| 10-1-42 to 6-30-43 | 39,828.00 | 22,578.29 | 17,249.71 |
| 7-1-43 to 6-30-44 | 55,585.00 | 35,112.59 | 20,472.41 |
| 7-1-44 to 6-30-45 | 55,054.00 | 35,090.08 | 19,963.92 |
| 7-1-45 to 6-30-46 | 59,396.00 | 35,802.90 | 23,593.10 |
| 7-1-46 to 6-30-47 | 65,961.00 | 42,150.48 | 23,810.52 |
| 7-1-47 to 6-30-48 | 72,832.00 | 44,814.74 | 28,017.26 |
| 7-1-48 to 6-30-49 | 78,606.00 | 47,468.24 | 31,137.76 |
| 7-1-49 to 6-30-50 | 82,328.00 | 48,565.63 | 33,762.37 |
| 7-1-50 to 6-30-51 | 79,885.00 | 47,689.30 | 32,195.70 |
| 7-1-51 to 6-30-52 | 82,343.00 | 55,671.29 | 26,671.71 |
| 7-1-52 to 6-30-53 | 75,530.00 | 55,853.09 | 19,676.91 |
| 7-1-53 to 6-30-54 | 76,865.00 | 66,106.50 | 10,758.50 |
| 7-1-54 to 6-30-55 | 73,884.00 | 66,917.53 | 6,966.47 |
| 7-1-55 to 6-30-56 | 73,055.00 | 63,977.38 | 9,077.62 |
| 7-1-56 to 6-30-57 | 71,387.00 | 61,974.56 | 9,412.44 |
| 7-1-57 to 6-30-58 | 68,219.00 | 64,294.45 | 3,924.55 |
| 7-1-58 to 6-30-59 | 63,130.00 | 65,383.49 | |
| 7-1-59 to 6-30-60 | 69,774.84 | 62,430.21 | 7,344.63 |
| | $2,102,863.50 | $1,525,817.01 | $579,299.98 |

* The above amount reverting to State Treasury does not include $19,487.38 for period 6-1-16 to 9-30-20.

# MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

## CLASSIFICATION OF FILMS

### July 1, 1959—June 30, 1960

| 1959 | Features | Short Subjects | Cartoons | Serials | Advertising | Misc. |
|---|---|---|---|---|---|---|
| July | 589 | 32 | 61 | 6 | 12 | 0 |
| August | 581 | 28 | 68 | 13 | 2 | 0 |
| September | 467 | 30 | 91 | 8 | 3 | 0 |
| October | 566 | 44 | 252 | 8 | 5 | 0 |
| November | 414 | 32 | 53 | 0 | 5 | 0 |
| December | 443 | 36 | 56 | 10 | 1 | 0 |
| **1960** | | | | | | |
| January | 487 | 35 | 73 | 8 | 3 | 0 |
| February | 434 | 39 | 79 | 8 | 6 | 0 |
| March | 459 | 41 | 74 | 4 | 6 | 0 |
| April | 404 | 50 | 88 | 0 | 3 | 0 |
| May | 398 | 46 | 79 | 0 | 3 | 0 |
| June | 579 | 67 | 69 | 10 | 3 | 0 |
| TOTALS | 5,821 | 480 | 1,043 | 75 | 52 | 0 |

## SUMMARY OF REPORT

| | | | | |
|---|---|---|---|---|
| Films, Original | 1,025 | | | |
| Films, Duplicate | 6,446 | | | |
| Reels, Original | | 6,637 | | |
| Reels, Duplicate | | 58,810 | | |
| Number of feet, Original | | | 5,351,753 | |
| Number of feet, Duplicate | | | 47,120,231 | |
| Films Approved, Original | | | | 1,008 |
| Films Approved, Duplicate | | | | 6,420 |
| Films Modified in Part, Original | | | | 17 |
| Films Modified in Part, Duplicate | | | | 26 |
| Films Denied | | | | 0 |
| TOTALS | 7,471 | 65,447 | 52,471,984 | 7,471 |

# MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

## REPORT OF FILMS EXAMINED

### July 1, 1959—June 30, 1960

| 1959 | Films Original | Films Duplicate | Reels Original | Reels Duplicate | No. of Ft. Original | No. of Ft. Duplicate | Films Approved | Films Modified In Part Original | Films Modified In Part Duplicate | Films Denied |
|---|---|---|---|---|---|---|---|---|---|---|
| July | 76 | 623 | 394 | 5,495 | 318,630 | 4,179,337 | 700 | 1 | 0 | 0 |
| August | 90 | 599 | 577 | 5,241 | 471,079 | 4,222,903 | 692 | 2 | 1 | 0 |
| September | 76 | 516 | 606 | 5,285 | 491,714 | 4,359,425 | 599 | 2 | 5 | 0 |
| October | 103 | 769 | 552 | 5,694 | 439,645 | 4,557,496 | 875 | 3 | 0 | 0 |
| November | 67 | 434 | 495 | 3,950 | 892,957 | 3,213,685 | 504 | 3 | 0 | 0 |
| December | 73 | 469 | 495 | 4,792 | 394,733 | 3,817,896 | 546 | 3 | 1 | 0 |
| **1960** | | | | | | | | | | |
| January | 77 | 514 | 491 | 4,700 | 398,127 | 3,785,152 | 606 | 0 | 15 | 0 |
| February | 73 | 493 | 463 | 4,789 | 384,082 | 3,895,345 | 566 | 0 | 0 | 0 |
| March | 93 | 490 | 687 | 4,456 | 554,804 | 3,548,097 | 584 | 1 | 0 | 0 |
| April | 73 | 472 | 411 | 3,973 | 328,264 | 3,189,743 | 545 | 0 | 0 | 0 |
| May | 83 | 443 | 529 | 4,350 | 428,693 | 3,518,458 | 526 | 0 | 0 | 0 |
| June | 124 | 598 | 937 | 6,085 | 749,025 | 4,832,694 | 728 | 2 | 4 | 0 |
| **TOTALS** | 1,008 | 6,420 | 6,637 | 58,810 | 5,351,753 | 47,120,231 | 7,471 | 17 | 26 | 0 |

[fol. 108] DEFENDANT'S EXHIBIT No. 4

# Forty-Fifth Annual Report

# MARYLAND STATE BOARD

# OF

# MOTION PICTURE CENSORS


Offices
State Office Building
301 W. Preston Street
Baltimore 1, Maryland

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[fol. 109]

HONORABLE J. MILLARD TAWES

GOVERNOR OF MARYLAND

STATE HOUSE

ANNAPOLIS, MARYLAND

DEAR GOVERNOR TAWES:

The Maryland State Board of Motion Picture Censors takes pleasure in submitting to you herewith the forty-fifth Annual Report of its operations, for the fiscal year ending June 30, 1961.

During this period, the Board examined and processed a total of 7,074 subjects, of which 1,137 were original, and 5,937 were duplicates. Of these 7,074 subjects, 7,045 were approved without modification and 27 were modified in part, and two films were rejected in their entirety.

The year's total receipts were $66,115.00. This revenue was derived from fees required by law for the Board's examination of films. After defraying expenses of $66,039.41, the sum of $1,577.65 unexpended appropriation was reverted to the Treasury. The all-time sum reverting to the Treasury amounts to $598,862.95, since the inception of the Board.

A total of 5,460 films were inspected during the year. These inspections were of theatres throughout the State, periodically made, to check compliance with the State Motion Picture Censorship law, and orders issued by the Board.

Appended hereto are tables showing the results of the Board's work for the fiscal year ending June 30, 1961, and also summarizing the total annual receipts for the Board's forty-five years operation.

Respectfully,

Norman L. Mason

*Chairman*

[fol. 110]

## MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

**For the Fiscal Year Ending June 30, 1961**

### RECEIPTS

| | |
|---|---|
| (a) Licenses (Original) | $ 19,106.00 |
| (b) Licenses (Duplicate) | 46,306.00 |
| (c) Licenses (Substitute) | 703.00 |
| Grand Total | $ 66,115.00 |

TOTAL RECEIPTS FOR FORTY-FIVE YEAR PERIOD

| | Receipts | Expenses | Receipts in Excess of Expenditures |
|---|---|---|---|
| 1916 - 1961 | $2,168,978.50 | $1,591,856.42 | $598,862.95 |

Budget Appropriation July 1, 1960 through June 30, 1961 ..... $ 66,391.00

### DISBURSEMENTS

Operating expenses:

| | | |
|---|---|---|
| Salaries | $ 9,299.59 | |
| Wages | 40,971.00 | |
| Technical & Special Fees | 5,937.50 | |
| Communication | 1,049.93 | |
| Travel | 2,682.17 | |
| Motor Vehicle Operation & Maintenance | 455.33 | |
| Contractural Services | 2,306.41 | |
| Materials & Supplies | 1,084.54 | |
| Office Equipment-Replacement | 964.13 | |
| Fixed Charges | 62.75 | |
| Total Disbursements | | $ 64,813.35 |

Amount Unexpended Appropriation as of June 30, 1961 ..... $ 1,577.65

[fol. 111]

## MARYLAND STATE BOARD MOTION PICTURE CENSORS

### CLASSIFICATION OF FILMS

### JULY 1, 1960—JUNE 30, 1961

| 1960 | Features | Short Subjects | Cartoons | Serials | Advertising | Misc. |
|---|---|---|---|---|---|---|
| July | 549 | 66 | 64 | 8 | 5 | 0 |
| August | 549 | 59 | 57 | 10 | 1 | 0 |
| September | 389 | 41 | 130 | 2 | 8 | 0 |
| October | 436 | 26 | 51 | 0 | 12 | 0 |
| November | 465 | 69 | 141 | 30 | 5 | 0 |
| December | 425 | 24 | 115 | 0 | 5 | 0 |
| 1961 | | | | | | |
| January | 366 | 29 | 130 | 0 | 7 | 0 |
| February | 345 | 18 | 28 | 0 | 7 | 0 |
| March | 412 | 88 | 87 | 0 | 2 | 0 |
| April | 361 | 31 | 68 | 0 | 0 | 0 |
| May | 498 | 38 | 57 | 0 | 3 | 0 |
| June | 492 | 94 | 165 | 0 | 6 | 0 |
| TOTALS | 5,287 | 583 | 1,093 | 50 | 61 | 0 |

### SUMMARY OF REPORT

| | | | | |
|---|---|---|---|---|
| Films, Original | 1,137 | | | |
| Films, Duplicate | 5,937 | | | |
| Reels, Original | | 7,310 | | |
| Reels, Duplicate | | 54,136 | | |
| Number of feet, Original | | | 5,826,795 | |
| Number of feet, Duplicate | | | 43,517,460 | |
| Films Approved, Original | | | | 1,122 |
| Films Approved, Duplicate | | | | 5,923 |
| Films Modified in Part, Original | | | | 13 |
| Films Modified in Part, Duplicate | | | | 14 |
| Films Denied | | | | 2 |
| TOTALS | 7,074 | 61,446 | 49,344,256 | 7,074 |

[fol 112]

## MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

### REPORT OF FILMS EXAMINED

### July 1, 1960—June 30, 1961

| 1960 | Films Original | Films Duplicate | Reels Original | Reels Duplicate | No. of Ft. Original | No. of Ft. Duplicate | Films Approved | Films Modified In Part Original | Films Modified In Part Duplicate | Films Denied |
|---|---|---|---|---|---|---|---|---|---|---|
| July | 95 | 597 | 530 | 4,714 | 429,908 | 3,896,679 | 692 | 0 | 0 | 0 |
| August | 80 | 594 | 605 | 6,187 | 470,132 | 4,982,475 | 676 | 2 | 0 | 0 |
| September | 100 | 467 | 651 | 3,849 | 506,880 | 3,085,905 | 570 | 0 | 3 | 0 |
| October | 92 | 425 | 555 | 4,332 | 441,771 | 3,470,595 | 525 | 0 | 8 | 0 |
| November | 126 | 582 | 732 | 4,452 | 574,228 | 3,537,215 | 710 | 1 | 1 | 0 |
| December | 87 | 479 | 663 | 3,949 | 545,629 | 3,142,865 | 569 | 1 | 2 | 0 |
| 1961 | | | | | | | | | | |
| January | 91 | 440 | 572 | 4,281 | 448,371 | 3,465,535 | 532 | 1 | 0 | 0 |
| February | 58 | 337 | 349 | 3,397 | 280,057 | 2,700,340 | 398 | 3 | 0 | 0 |
| March | 99 | 487 | 695 | 4,035 | 556,488 | 3,330,143 | 587 | 1 | 0 | 2 |
| April | 70 | 390 | 511 | 3,499 | 409,109 | 2,815,133 | 460 | 0 | 0 | 0 |
| May | 84 | 510 | 621 | 6,126 | 537,972 | 4,821,921 | 596 | 2 | 0 | 0 |
| June | 140 | 615 | 826 | 5,315 | 626,250 | 4,268,654 | 757 | 2 | 0 | 0 |
| TOTALS | 1,122 | 5,923 | 7,310 | 54,136 | 5,826,795 | 43,517,460 | 7,072 | 13 | 14 | 2 |

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[fol. 113]

DEFENDANT'S EXHIBIT No. 3

# FORTY-SIXTH ANNUAL REPORT

of the

# MOTION PICTURE CENSOR BOARD

## MARYLAND

## FISCAL YEAR 1962

## WORK OF THE BOARD

During the Fiscal Year, the Board reviewed 653 original films in addition to 526 re-issued (films that have been reprinted by film companies and returned to the distribution market for exhibition in theatres) and processed 5,504 duplicate prints. There were 494 substitute seals issued to replace seals that had been lost or destroyed. Forty (40) films were modified in part, and three (3) films were rejected in toto.

## OPINIONS BY THE ATTORNEY GENERAL

In response to many inquiries from the public, the State Law Department viewed the film "La Dolce Vita", and in summation felt that the film was calculated to be shocking and in some sense irreverent and containing much that might better be left unshown, but found no grounds on which the Board might legally disapprove the film.

The Board requested the State Law Department to advise whether they (the Board) had the right to examine and license each trailer (i.e., excerpts of films to be subsequently shown at the same theatre, also known as "previews") and all duplicates thereof, which are exhibited in Maryland. On October 25, 1961, the State Law Department ruled that under Section 2 of Article 66A, Annotated Code of Maryland, the Board has the right to require all trailers and duplicates thereof to be submitted for censorship.

## COURT OPINIONS

On March 23, 1962, the Baltimore City Court substantiated the Board's rejection of the film "The Immoral Mr. Teas", wherein the Board found the film to be obscene, that its calculated purpose to arouse sexual desires, violated Article 66A, Section 6 (a) and (b) of the Annotated Code of Maryland.

On May 11, 1962, the Baltimore City Court reversed the findings of the Motion Picture Censor Board in ordering two sequences to be eliminated from the film "Les Amants" (The Lovers). The Court ruled that the film was not obscene, erotic or pornographic under the Maryland Statute, and could be exhibited in its entirety.

## FINANCIAL STATEMENT

The year's total receipts were $63,686.00. This revenue was derived from fees required by law for the Board's examination of films. After defraying expenses of $64,146.45, the sum of $2,738.55 unexpended appropriation was reverted to the Treasury. The all-time sum reverting to the Treasury amounts to $577,887.69, since the inception of the Board.

## INSPECTIONS

During 2,682 visits made to theatres throughout the fiscal year, the Motion Picture Inspectors examined 5,687 films and found 262 infractions of the law, which were corrected without delay. Inspections of all theatres throughout the State are made periodically, to check compliance with the State Motion Picture Censorship Law, and orders issued by the Board.

## MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

**For the Fiscal Year Ending June 30, 1962**

### RECEIPTS

| | |
|---|---|
| (a) Licenses (Original) | $ 19,192.00 |
| (b) Licenses (Duplicate) | 44,000.00 |
| (c) Licenses (Substitute) | 494.00 |
| Grand Total | $ 63,686.00 |

TOTAL ANNUAL RECEIPTS FOR FORTY-SIX YEAR PERIOD

| | Receipts | Expenses | Receipts in Excess of Expenditures |
|---|---|---|---|
| 1916 - 1962 | $2,232,664.50 | $1,654,776.81 | $577,887.69 |

Budget Appropriation July 1, 1961 through June 30, 1962 ..... $ 66,885.00

### DISBURSEMENTS

Operating expenses:

| | | |
|---|---|---|
| Salaries | $ 50,046.62 | |
| Technical & Special Fees | 5,812.50 | |
| Communication | 1,413.50 | |
| Travel | 2,544.11 | |
| Motor Vehicle Operation & Maintenance | 478.18 | |
| Contractural Services | 2,086.86 | |
| Materials & Supplies | 823.05 | |
| Office Equipment-Replacement | 714.38 | |
| Fixed Charges | 227.25 | |
| Total Disbursements | | $ 64,146.45 |

Amount Unexpended Appropriations as of June 30, 1962 ..... $ 2,738.55

[fol. 115]

## MARYLAND STATE BOARD OF MOTION PICTURE CENSORS

### CLASSIFICATION OF FILMS

### JULY 1, 1961—JUNE 30, 1962

| 1961 | Features | Short Subjects | Cartoons | Serials | Advertising | Misc. |
|---|---|---|---|---|---|---|
| July | 436 | 21 | 77 | 0 | 10 | 0 |
| August | 463 | 45 | 103 | 0 | 5 | 0 |
| September | 493 | 28 | 91 | 2 | 7 | 0 |
| October | 389 | 47 | 62 | 6 | 9 | 0 |
| November | 392 | 56 | 135 | 4 | 8 | 0 |
| December | 367 | 50 | 77 | 4 | 1 | 0 |
| 1962 | | | | | | |
| January | 421 | 65 | 99 | 16 | 1 | 0 |
| February | 323 | 38 | 105 | 0 | 8 | 0 |
| March | 436 | 27 | 102 | 16 | 4 | 0 |
| April | 361 | 68 | 86 | 4 | 4 | 0 |
| May | 450 | 31 | 48 | 3 | 10 | 0 |
| June | 431 | 49 | 87 | 0 | 2 | 0 |
| TOTALS | 4,962 | 525 | 1,072 | 55 | 69 | 0 |

### SUMMARY OF REPORT

| | | | | |
|---|---|---|---|---|
| Films, Original | 1,179 | | | |
| Films, Duplicate | 5,504 | | | |
| Reels, Original | | 7,296 | | |
| Reels, Duplicate | | 51,407 | | |
| Number of Feet, Original | | | 5,748,339 | |
| Number of Feet, Duplicate | | | 41,461,560 | |
| Films Approved, Original | | | | 1,136 |
| Films Approved, Duplicate | | | | 5,494 |
| Films Modified in Part, Original | | | | 40 |
| Films Modified in Part, Duplicate | | | | 10 |
| Films Denied | | | | 3 |
| TOTALS | 6,683 | 58,703 | 47,209,899 | 6,683 |

[fol. 116]

IN THE CRIMINAL COURT OF BALTIMORE

---

STATE OF MARYLAND,

—vs.—

RONALD L. FREEDMAN.

Indictment #4273/62

---

Baltimore, Maryland,
May 24, 1963.

Before HONORABLE ANSELM SODARO, J.

APPEARANCES:

Robert T. Freeze, Esquire on behalf of the State.
Richard Whiteford, Esquire on behalf of the Defendant.

---

The Clerk: Ronald L. Freedman. Mr. Whiteford, Mr. Bilgrey.

Mr. Whiteford: Good morning, Your Honor.

The Court: This case was concluded on the motion for [fol. 117] a judgment of acquittal at the termination of the entire case, that is correct, is it not?

Mr. Whiteford: Yes, sir.

DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL

The Court: I will deny the motion. Do you have any additional testimony?

Mr. Whiteford: No, sir.

The Court: Well, the verdict is guilty. I am filing a short memorandum which will be in the file, there is no purpose in reading it now, I will file it in the original papers and let you have a copy of it.

Mr. Whiteford: Yes, sir.

The Court: Is he ready for sentence?

Mr. Whiteford: We are, sir.

SENTENCE

The Court: The fine is $25 and costs.

Mr. Whiteford: Thank you, sir.

[fol. 118]

IN THE CRIMINAL COURT OF BALTIMORE

---

STATE OF MARYLAND,

VS.

RONALD L. FREEDMAN.

---

DOCKET ENTRIES

. . . . . .

May 24, 1963—Verdict: Guilty.
May 24, 1963—Judgment: Fined $25.00 and Costs.

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[fol. 119]

IN THE CRIMINAL COURT OF BALTIMORE

---

STATE OF MARYLAND,

VS.

RONALD FREEDMAN.

Ind. #4273/1962

---

MEMORANDUM OPINION—May 24, 1963

SODARO, J.

The defendant is charged under indictment with violation of Article 66A Section 2 of the Annotated Code of Maryland, which reads as follows:

"Moving Pictures.

Sec. 2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit, or use any motion picture film or view in the State of Maryland unless the said film or view has been sub-

mitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

The facts are not in dispute in that the defendant on November 1, 1962, did publicly show a certain motion picture entitled "Revenge at Daybreak", at the Rex Theatre in Baltimore City, without having previously submitted the film for licensing and approval by the State Board of Censors.

The defendant contends that Article 66A, upon its face, violates the First and Fourteenth Amendments of the United States Constitution in that it imposes an invalid infringement upon the exercise of the right of free speech and press; that it is invalid as contrary to the Due Process Clause of the Fourteenth Amendment, specifically in that the standards pursuant to which speech is abridged, set forth in Section 6 of said Article, are vague and that the standards fail to advise the defendant of those forms of speech which the State purportedly proscribes; that Article 66A, upon its face, violates Article 40 of the Maryland Declaration of Rights and is specifically contrary to the Due Process Clause of Article 23 of the Declaration [fol. 120] of Rights of Maryland in that the standards contained in Section 6 of said Article, which permit the depriving of defendant's life, liberty or property, are couched in vague language which fail to apprise the defendant of the conduct the standard seeks to proscribe; that said Article is invalid as contrary to, and imposes an unlawful infringement upon the Interstate Commerce Clause of the United States Constitution, and specifically that it imposes a tax and/or license fee upon the right of the freedom of speech and press; that it is invalid and void in that it is an unlawful and illegal delegation of legislative authority to an administrative agency.

These grounds of attack collectively simply challenge the Censor's basic authority and do not go to any statutory standards or procedural requirements as to the submission of the film. It is not the contention of the State that the film in question violates any of the standards set out in the Statute.

After consideration of argument of counsel and briefs which were filed by both sides, I have concluded that Article 66A, and in particular Section 2 thereof which is the basis of the charge, is valid and constitutional. Although this challenged Section imposes a previous restraint, the ambit of constitutional protection does not include complete and absolute freedom to exhibit any and every kind of motion picture and this challenged provision, requiring the submission of films prior to their public exhibition, is not, on the grounds set forth by the Defendant, void on its face.

The defendant's broadside attack on the constitutionality of this Section is similar to that made in the case of Times Film Corporation v. City of Chicago, Et Al., 365 U.S. 43, in which Mr. Justice Clark, speaking for the majority court, said "Certainly, petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that—aside from any consideration of the other exceptional cases mentioned in our decisions—the State is stripped of all constitutional power to prevent, in the [fol. 121] most effective fashion, the utterance of this class of speech. It is not for this court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances."

Consequently, the Defendant's Motion for Judgment of Acquittal is hereby denied.

Anselm Sodaro, Judge.

May 24, 1963

[fol. 122] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 123]

IN THE COURT OF APPEALS OF MARYLAND

No. 144

September Term, 1963

---

RONALD L. FREEDMAN

v.

STATE OF MARYLAND

---

Henderson, Hammond, Prescott, Marbury, Sybert, Justices.

OPINION—Filed: February 10, 1964

[fol. 124] Sybert, J.

In order to test the constitutionality of the Maryland motion picture censorship statute, the appellant invited arrest by exhibiting the motion picture film "Revenge at Daybreak" at a theatre in Baltimore City without first having submitted the film to the Maryland State Board of Motion Picture Censors for approval and licensing, as required by Code (1957), Art. 66A, Sec. 2.[1] He was indicted and tried in the Criminal Court of Baltimore for violation of Sec. 2, and convicted after his timely motions for judgment of acquittal were denied. He now appeals.

The appellant has attempted, both in the court below and on this appeal, to attack the constitutionality of Art. 66A in its entirety, even though he was tried and convicted only for violation of Sec. 2. The principal contention is that the statute is void on its face as an unconstitutional infringement upon free speech and press violative of the First Amendment to the United States Constitution (made

[1] "§2. It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

applicable to the States under the Fourteenth Amendment) and of Art. 40 of the Maryland Declaration of Rights. The appellant then argues that in the defense of a criminal prosecution under Sec. 2 of Art. 66A he is entitled to challenge the constitutionality of the entire statute "since he is charged with a violation under the Act." Acting upon that premise, he proceeds to attack separately what he asserts are constitutional infirmities of certain features of the Act. His claims are that the Act fails to provide ade- [fol. 125] quate procedural safeguards (although he noted that Sec. 19 of Art. 66A affords an appeal to the Baltimore City Court and thence to this Court); that the standards established by Sec. 6[2] of the Act are vague and hence invalid as construed and applied; that the statute deprives him of equal protection of the law in that newsreels and noncommercial exhibitors such as educational, charitable,

---

[2] "§6. (a) *Board to examine, approve or disapprove films.*—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. * * *

"(b) *What films considered obscene.*—For the purpose of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

"(c) *What films tend to debase or corrupt morals.*—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) *What films tend to incite to crime.*—For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

fraternal and religious organizations are excluded from the operation of the Act; and that the fee charged for the inspection and licensing of a film constitutes an invalid tax upon the exercise of freedom of speech.

[fol. 126] The State maintained below and here that the statute is not void on its face, and that since the appellant did not submit his film to the Board for approval and licensing he lacks standing to challenge any provision or requirement of Art. 66A, except the provisions of Sec. 2, for violation of which he was convicted. The trial court agreed with the position of the State. Parenthetically, it is noted that neither the appellant nor the State even suggests that the film "Revenge at Daybreak" would violate any of the standards set out in the statute, and the State conceded that it would have been approved had it been submitted for licensing.

We shall first consider the appellant's main attack—that the Maryland statute is void on its face as an unconstitutional prior restraint imposed upon the freedoms of speech and press protected against State action by the First and Fourteenth Amendments and by Art. 40 of the Maryland Declaration of Rights.

The Supreme Court of the United States, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 96 L.Ed. 1098 (1952), held that motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, affords to speech and the press, and struck down the use of "sacrilegious" as a permissible censorship standard. However, the Court intimated that some form of censorship might be permissible when it said (at p. 502 of 343 U.S.): "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute [fol. 127] freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas." The Court further stated (*ibid.*) in considering the argument that motion pictures possess a greater capacity for evil, particularly among

the youth of a community, than other modes of expression: "If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." Subsequent to *Burstyn*, a number of film censorship cases reached the Supreme Court which involved questions of standards. The films in those cases had all been submitted to the appropriate authorities and permits for their exhibition were refused because of their content. Thus those cases are not apposite here and will not be reviewed.

In 1961, in *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 5 L.Ed. 2d 403, the question whether or not the constitutional guaranty of freedom of speech and of the press was violated by prior censorship was placed squarely before the Supreme Court. The appellant in that case, a motion picture exhibitor, challenged the validity of an ordinance of the City of Chicago which, as a prerequisite to public exhibition, required the submission of films to a censor. The exhibitor applied for a permit and tendered the license fee, as required by the ordinance, but refused to submit the film for examination. The permit was denied solely because of the refusal to submit the film. The exhibitor sought injunctive relief, challenging the ordinance on the ground [fol. 128] that the First Amendment guaranties were violated by the prior censorship requirement, thus rendering the ordinance void on its face. The Supreme Court found that the attack was an attempt to have the Court hold that the public exhibition of motion pictures must be permitted under any circumstances, and that previous restraint cannot be justified regardless of the capacity of motion pictures for evil, or the extent thereof. In rejecting that contention, the Court said (pp. 49-50 of 365 U.S.):

> "With this we cannot agree. We recognize in *Burstyn, supra*, that 'capacity for evil . . . may be relevant in determining the permissible scope of community control,' at p. 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method,' we said, 'tends to present its own pecul-

> iar problems.' At p. 503. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that—aside from any consideration of the other 'exceptional cases' mentioned in our decisions—the State is stripped of all constitutional power to prevent in the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, *absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.*" (Emphasis supplied.)

In affirming the dismissal of the exhibitor's complaint, the Supreme Court held that the requirement of Chicago's ordinance for submission of films prior to their public exhibition was not void on its face as an invasion of the constitutional guaranties.

The Supreme Court's refusal to strike down all prior censorship of motion pictures was recognized and restated last year in *Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58, 9 L.Ed. 2d 584 (1963). In that case the court found unconstitutional a Rhode Island agency formed to screen books and magazines and to recommend the prosecution of viola- [fol. 129] tors of appropriate statutes, on the ground that the Act creating the agency did not require proper judicial superintendence. However, the court said, in Footnote 10 of *Bantam* (at p. 70 of 372 U.S.):

> "Nothing in the Court's opinion in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, is inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.* In declining to hold prior restraints unconstitutional *per se,* the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures." (Emphasis by Court.)

We conclude that on the authority of the *Times Film* case, *supra,* the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments. However, the appellant also argues that the statute is in conflict with Art. 40 of the Maryland Declaration of Rights, which provides:

> "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

We find no merit in this argument. The right to speak and print, protected by Art. 40, is not absolute. This Court has held that the liberty of the press does not include the privilege of taking advantage of the incarceration of a person accused of crime to photograph his face and figure against his will. *Ex Parte Sturm,* 152 Md. 114, 120, 136 Atl. 312 (1927). The guaranty of freedom of speech and press ordained in Art. 40 would appear to be, in legal [fol. 130] effect, substantially similar to that enunciated in the First Amendment, and it is significant that Art. 40 has been treated by this Court as in *pari materia* with the First Amendment. See, for example, *Police Comm'r* v. *Siegel, etc., Inc.,* 223 Md. 110, 128, 162 A.2d 727 (1960); *Baltimore* v. *A. S. Abell Co.,* 218 Md. 273, 289, 145 A.2d 111 (1958). We therefore see no reason why Art. 40 should be interpreted differently from the First Amendment.

We think the State is correct in its contention that since the appellant chose to mount his attack on the constitutionality of motion picture censorship in Maryland by refusing to submit his film to the Board as required by Sec. 2 of Art. 66A (for which alone he was indicted), he has restricted himself to an attack on that section alone, and lacks standing to challenge any of the other provisions (or alleged shortcomings) of the statute. The appellant's contention that the entire Act is subject to challenge when the State seeks a criminal conviction for failure to comply with a single provision of it is untenable. The indictment

did not involve procedures or standards under other sections of the Act, or any of the other matters sought to be raised by the appellant, and thus there was no ripe and justiciable issue as to such matters before the trial court, and there is none before us. Other avenues—such as an action for injunctive or declaratory relief—are open to the appellant for the determination of such issues when he is faced with invasion of his rights.

[fol. 131] In *Hammond* v. *Lancaster*, 194 Md. 462, 71 A.2d 474 (1950), Judge Henderson, for the Court, reviewed the authorities dealing with the matter of standing to seek a judicial determination of a constitutional question in advance of the necessity for its decision. He pointed out that the Supreme Court, in *Federation of Labor* v. *McAdory*, 325 U.S. 450, 89 L.Ed. 1725 (1945), dismissed the writ of *certiorari* which it had issued in a case brought in the Alabama State court against enforcement officers for a declaratory judgment adjudicating the constitutionality of an Alabama Act which, it was contended, violated rights of free speech, due process and equal protection, and was vague and indefinite, and he quoted Chief Justice Stone as saying, "* * * this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.'" To the same effect are *Hitchcock* v. *Kloman*, 196 Md. 351, 76 A.2d 582 (1950); *Tanner* v. *McKeldin*, 202 Md. 569, 580, 97 A.2d 449 (1953); *Givner* v. *Cohen*, 208 Md. 23, 37, 116 A.2d 357 (1955), and *Dutton* v. *Tawes*, 225 Md. 484, 171 A.2d 688 (1961), app. dism. 368 U.S. 345, 7 L.Ed. 2d 342, in the last of which cases Judge Hammond, for the Court, said (at p. 501 of 225 Md.): "In the view we take of the case, however, we think appellants are not entitled to have a declaration as to the constitutionality of the compact in operation. They have not shown that they are engaged in or faced with actual controversy, or that the issues are ripe and justiciable, so [fol. 132] as to be able to call upon the courts to exercise the declaratory process. * * *" For the latest case in which this Court has had occasion to consider the question of standing to raise issues, see *Citizens Comm.* v. *Anne*

*Arundel Co.*, No. 135, this Term, —— Md. ——, —— A.2d —— (1964).

The appellant relies strongly upon the cases of *Staub* v. *Baxley*, 355 U.S. 313, 2 L.Ed. 2d 302 (1958), and *Lovell* v. *Griffin*, 303 U.S. 444, 82 L.Ed. 949 (1938), to support his claim that he has standing to attack provisions of the Act other than Sec. 2. However, these cases are distinguishable. In each, the Supreme Court expressly found that the ordinance involved was void *on its face*, whereas the Chicago ordinance, substantially similar to the Maryland statute, was held not to be void on its face in *Times Film, supra.*

We hold that the requirement of Art. 66A, Sec. 2, that films be submitted to the Censor Board for approval and licensing before public exhibition, is not void on its face and is valid and enforceable. We also hold that, in this case, the appellant had no standing to question other portions of the statute.

*Judgment Affirmed; Appellant to Pay Costs.*

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[fol. 133]

IN THE COURT OF APPEALS OF MARYLAND

No. 144—September Term, 1963

Ind. 4273, Docket 1962

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RONALD L. FREEDMAN,

v.

STATE OF MARYLAND.

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Appeal from the Criminal Court of Baltimore.

Filed: July 11, 1963.

February 10, 1964: Judgment affirmed; appellant to pay costs. Opinion by Sybert, J.

Statement of Costs:

In Circuit Court:

| | |
|---|---|
| Record | — |
| Stenographer's Costs | $33.00 |

In Court of Appeals:

| | |
|---|---|
| Filing Record on Appeal | $ 20.00 |
| Printing Brief for Appellant | 685.68 |
| Reply Brief | |
| Portion of Record Extract—Appellant | |
| Appearance Fee—Appellant | 10.00 |
| Printing Brief for Appellee | 215.00 |
| Portion of Record Extract—Appellee | |
| Appearance Fee—Appellee | 10.00 |

State of Maryland, Set:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this eleventh day of March A. D. 1964.

J. Lloyd Young, Clerk of the Court of Appeals in Maryland.

(Seal)

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

[fol. 139] [File endorsement omitted]

IN THE CRIMINAL COURT OF BALTIMORE CITY

Indictment #4273

September Term, 1962

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STATE OF MARYLAND, Appellee,

vs.

RONALD FREEDMAN, Appellant.

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 1, 1964

I. Notice is hereby given that Ronald Freedman, the Appellant named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland affirming judgment of conviction entered on February 10, 1964.

This Appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

Appellant was convicted of the crime of exhibiting a motion picture without submitting it to the Maryland Board of Motion Picture Censors for license and approval, in violation of Article 66A, Section 2 of the Annotated Code of Maryland 1957 Volume as amended, and was fined the sum of Twenty-Five ($25.00) Dollars, which said sum has been paid.

II. The Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States, and should in such transcript include the following:

1. Mandate of the Court of Appeals of Maryland No. 144, September Term, 1963.
2. The Opinion of the Court of Appeals of Maryland No. 144, September Term, 1963, Opinion by Sybert, J.

[fol. 140] 3. Indictment, Criminal Court of Baltimore City, No. 4273, September Term, 1962.

4. Stipulation of Facts, i.e. State exhibit No. 1.

5. License Agreement, i.e. State exhibit No. 1A.

6. Rules of the Maryland Board of Motion Picture Censors, i.e. Defendant's exhibit No. 1.

7. 46th Annual Report of Motion Picture Censor Board, i.e. Defendant's exhibit No. 3.

8. 45th Annual Report of the Motion Picture Censor Board, i.e. Defendant's exhibit No. 4.

9. 44th Annual Report of the Motion Picture Censor Board, i.e. Defendant's exhibit No. 5.

10. Transcript of the proceedings in the case.

11. Motion for judgment by acquittal.

12. Memorandum Opinion filed in the lower court by Judge Sodaro.

III. The following questions are presented by this Appeal:

1. Has Maryland, in imposing a criminal penalty on an act of free expression of a concededly legitimate matter, directly transgressed the First and Fourteenth Amendments of the United States Constitution?

2. Has the State of Maryland used its criminal processes in an attempt to coerce the appellant to purchase from the State the privilege of publicly exhibiting a concededly permissible motion picture, by seeking to impose a tax or license fee upon the appellant's exercise of his constitutional rights of free expression in contravention of the First and Fourteenth Amendments of the United States Constitution?

[fol. 141] 3. In seeking to use its criminal processes to coerce appellant, to submit a concededly permissible motion picture to the Maryland Board of Motion Picture Censors for approval, which picture, the State acknowledges, that Board could not have lawfully withheld, was not Mary-

land seeking to delay appellant in the immediate exercise of his present right of free expression in contravention of the First and Fourteenth Amendments?

Felix J. Bilgrey, 144 West 57th Street, New York 19, New York.

Richard C. Whiteford, 301 North Charles Street, Baltimore, Maryland 21201, PLaza 2-0987,

Attorneys for Appellant.

Certificate of Service (omitted in printing).

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[fol. 142]

SUPREME COURT OF THE UNITED STATES

No. 1087—October Term, 1963

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RONALD L. FREEDMAN, Appellant,

vs.

MARYLAND.

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Appeal from the Court of Appeals of the State of Maryland.

ORDER NOTING PROBABLE JURISDICTION—June 22, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]69

RONALD L. FREEDMAN,

*Appellant,*

v.

STATE OF MARYLAND,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## JURISDICTIONAL STATEMENT

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## Miscellaneous

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No.

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RONALD L. FREEDMAN,

*Appellant,*

v.

STATE OF MARYLAND,

*Appellee.*

---

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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## JURISDICTIONAL STATEMENT

Appellant appeals from a final judgment of the Court of Appeals of Maryland, entered on February 10, 1964, affirming a judgment of the Baltimore Court convicting appellant of violating Article 66A of the Maryland Code and imposing a $25.00 fine upon him. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

### Opinions Below

The opinion of Judge Anselm Sodaro of the Criminal Court of Baltimore is not reported. A copy of that opinion is annexed hereto as Appendix B, *infra,*

p. App. 15. The opinion of the Court of Appeals of Maryland is reported in 197 A.2d 232. A copy of that opinion is annexed hereto as Appendix C, *infra*; p. App. 18.

## Jurisdiction

The final judgment of the Court of Appeals of Maryland was entered February 10, 1964. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2), the courts below, in finding appellant guilty of violating Article 66A of the Maryland Code and in affirming the judgment of conviction, having rejected appellant's timely claims that said state statute is invalid on the ground of its being repugnant to the Fourteenth Amendment of the Constitution of the United States. The following decisions sustain the jurisdiction of this Court: *Lovell* v. *Griffin*, 303 U.S. 444; *Niemotko* v. *Maryland*, 340 U.S. 268; *Staub* v. *City of Baxley*, 355 U.S. 313.

The Notice of Appeal was filed in the Criminal Court of Baltimore on May 1, 1964

## Questions Presented

The state of Maryland has imposed criminal penalties on appellant because he publicly exhibited what the State acknowledged to be an entirely permissible motion picture without purchasing the State's prior approval of the concededly permissible motion picture through submission of the motion picture to the Maryland Motion Picture Censor Board:

1. Has not Maryland, in imposing criminal penalties on the very act of free expression of concededly legitimate matter, directly transgressed the First and Fourteenth Amendments?

2. In seeking to use its criminal processes to coerce appellant:

(A) to purchase from the State the privilege of publicly exhibiting a concededly permissible motion picture, was not Maryland seeking to impose a tax on appellant's exercise of his constitutional right of free expression in contravention of the First and Fourteenth Amendments?

(B) to submit a concededly permissible motion picture to the Motion Picture Censor Board for approval which, the State acknowledges, that Board could not have lawfully withheld, was not Maryland seeking to delay appellant in the immediate exercise of his present right of free expression in contravention of the First and Fourteenth Amendments?

## Statutory and Constitutional Provisions Involved

1. The statute, the validity of which has been drawn in question is Article 66A of the Maryland Code.[1] Sections 2, 6, and 11 of which are as follows:

ACT OF 1922, CHAPTER 390

Article 66A, Annotated Code of Maryland (1960 Ed).

2. It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner

[1] The statute is set forth in full, Appendix A, p. 1, infra.

or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this Article called the Board.

6. (a) The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) For the purposes of this Article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) For the purposes of this Article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) For the purposes of this Article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

11. For the examination of each and every one thousand feet (1,000′) of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of Three Dollars ($3.00), where the film averages sixteen (16) frames or less to the foot, and a fee of Four Dollars ($4.00) where the film averages more than sixteen (16) frames to the foot, and a fee of One Dollar ($1.00) for the approval of every duplicate of one thousand feet (1,000′) or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of Two Dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of Two Dollars ($2.00) for each one hundred (100) views or fractional part thereof, and for the approval of duplicate views or prints thereof a fee of One Dollar ($1.00) for each on hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee

of One Dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of Section 7 of this Article; and the Board shall account for and pay all fees received by it into the State Treasury.

2. The constitutional provision to which, in appellant's view, the foregoing statutory provisions are repugnant, is Section 1 of the Fourteenth Amendment of the Constitution of the United States.

## Statement

Appellant manages the Rex Theatre, in Baltimore. E. 39.[2] On November 1, 1962, appellant telephoned Mrs. Eva Holland, an employee of the Maryland Motion Picture Censor Board, advising her of his intention to exhibit, at the Rex Theatre in the regular course of business, a film—"Revenge at Daybreak" —which had not been submitted to the Board for censorship. E. 31. Mrs. Holland appeared at appellant's theatre that evening and saw "the film exhibited in its entirety." E. 31-32. And thereupon, on instruction of the Chairman of the Board, Mrs. Holland secured a warrant for appellant's arrest, which was served on appellant by a Baltimore policeman. E. 37.

Following indictment, appellant was tried in the Baltimore Criminal Court, on March 18, 1963, for the alleged violation of Article 66A of the Maryland Code, which makes it "unlawful to . . . exhibit . . .

[2] All references to "E" pages in this Jurisdictional Statement are to the Appendix to Appellant's Brief filed in the Court of Appeals of Maryland.

any motion picture film in the State of Maryland unless the said film has been submitted by the . . . lessee of the film . . . and duly approved and licensed by the . . . [Motion Picture Censor] Board."

In his opening statement counsel for appellant advised Judge Sodaro that "the State purports to have the right under this act [Article 66A] to restrain the right of Mr. Freedman to exercise his Constitutional freedoms of speech and press. It is the belief of Mr. Freedman and myself that the Censorship Act is an oppressive act that is unconstitutional under both the Federal and State Constitutions . . ." E. 29.

The State proved, through Mrs. Holland, that appellant had exhibited "Revenge at Daybreak" without submitting it for censorship. E. 31-32. Appellant was not permitted to examine Mrs. Holland on whether the film satisfied the statutory censorship standards, but appellant offered to prove, that had she been permitted to answer, Mrs. Holland would have acknowledged "that the film did not violate any of the standards set forth in this Act." E. 36.

Appellant, by calling members of the Motion Picture Censor Board, showed the way in which the Board administers the statutory censorship standards.[3]

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[3] For example, appellant's counsel examined Norman Mason, a member of the Board, on the way in which the Board has administered Section 6(c), which is almost verbatim the same as the section of the New York statute involved in *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, in which the New York ban on the film of "Lady Chatterly's Lover" was set aside (E. 56-57):

> Q. You know it involved the same standard, Mr. Mason, having knowledge of the fact that these standards have been knocked out by the United States Supreme Court, have you

Appellant testified that in submitting an average film for censorship, one has to pay a fee of, on the average, some $30. E. 40. Appellant also showed, through the Board's annual reports, that over the course of the Board's existence the fees it has collected have exceeded administrative costs by over a half million dollars, which excess has gone to the Maryland Treasury. E. 28. The prosecutor advised Judge Sodaro that Maryland did not contend that the Motion Picture Censor Board would not have approved "Revenge at Daybreak" had it been submitted. E. 43. At appellant's request, Judge Sodaro himself viewed the film (E. 44), and the film is part of the record in this case (E. 31).

At the close of all the testimony, appellant moved for a judgment of acquittal on the grounds, *inter alia*, that Article 66A of the Maryland Code

> . . . violates the First and Fourteenth Amendments of the United States Constitution in that

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still continued to employ the use of these same standards in the censoring of films? A. Sir——

(T. 25) (Mr. Freeze) Objection.

(The Court) Well, let him answer. Let him answer.

(Witness) Sir, each picture is altogether different. It depends upon the circumstances why certain scenes would be allowed in a picture; and, maybe other circumstances possibly it would not be. I mean, each picture has to go on its own. I mean, in other words, you can't very well take one picture and it has been a guide only to a certain degree.

(Question read.)

Q. (Mr. Bilgrey) Is your answer yes? A. No, it isn't yes. Each picture has to stand on its own merits, I mean, rarely do you see two pictures, in fact, I have never seen two pictures identically alike; and, certain parts of a picture tends to make it altogether different than other parts in the picture.

Q. I would still like to get an answer yes or no.

(The Court) Well, the answer to the question (T. 26) is,

said Article imposes an invalid infringement upon the exercise of the right of free speech and press . . .

. . . is invalid as contrary to the Due Process Clause of the Fourteenth Amendment in that the standards pursuant to which speech is abridged set forth in, more specifically, Section 6 of said Article, are vague and in that these standards fail to advise defendant of those forms of speech which the state purportedly proscribes . . .

. . . is so vague and indefinite in form that it can be interpreted as to permit within the scope of its language the banning of incidents fairly within the protection or guarantee of freedom of speech and press and is therefore void as contrary to the Fourteenth Amendment of the United States Constitution and as contrary to the terms of the Maryland Constitution . . .

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Mr. Mason, as I understand it, knowing these standards have been knocked out by the Supreme Court, do you still use those same standards?

(Witness) No.

(The Court) The answer is no.

Q. (Mr. Bilgrey) What standards do you use if you do not use the standards that are contained in Section 6? What standards do you use, that is what we are trying to find out. A. With each picture depends solely on itself. No way to make a general answer of that particular question.

Q. You use different standards, then, in connection with your judging of every individual film? A. Any portion of any picture that the Supreme Court has ruled on we try to go by the Supreme Court ruling. I mean, we don't try to overpower those boys, is that what you mean?

Another member of the Board, Mrs. Louise E. Shecter, answered as follows (E. 73):

Q. (Mr. Whiteford) Miss Shecter, could you apply discretionary standards as a censor? A. That is right.

> . . . is invalid in that it imposes a tax and/or a license fee upon the right of the freedoms of speech and press and is thus contrary to the First and Fourteenth Amendments of the United States Constitution. . . .

On May 24, 1963, Judge Sodaro filed a memorandum opinion (E. 76) overruling appellant's federal claims and denying his motion for acquittal. Thereupon Judge Sodaro entered a judgment of conviction and fined appellant $25. (E. 1.)

Appellant, repeating his federal claims, appealed the judgment of conviction to the Maryland Court of Appeals. On February 10, 1964, the Court of Appeals affirmed the judgment of conviction. 197 Atl. 2d 232. Although expressly noting that the State conceded that "Revenge at Daybreak" would have been approved had it been submitted for censorship, the Court of Appeals concluded—as had Judge Sodaro below—that the decision in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, ruled the case adversely to appellant's federal claims.

**The Federal Questions are Substantial**

The Criminal Court of Baltimore, rejecting defenses predicated on the First and Fourteenth Amendments to the Constitution, found appellant guilty of violating Article 66A, § 2, of the Maryland Code, and this judgment of criminal guilt was upheld by the Maryland Court of Appeals. Appellant submits that the judgment and opinion of the Court of Appeals determined certain substantial federal ques-

tions, which had been duly tendered to that court, in a way which is in probable conflict with applicable decisions of this Court:

## I.

**The Maryland Court of Appeals held, erroneously, that the present case was controlled by *Times Film Corp.* v. *Chicago*, 365 U.S. 43. This holding led the Court of Appeals into the further error of affirming a criminal conviction imposed on appellant for exercising his right under the First and Fourteenth Amendment to exhibit a concededly permissible film.**

### A. The instant case is not controlled by *Times Film Corp.* v. *Chicago*

The Maryland Court of Appeals agreed with the Criminal Court of Baltimore that appellant's federal claims were governed, adversely to appellant, by this Court's decision in *Times Film Corp.* v. *Chicago, supra.* Appellant submits that in sustaining his conviction "on the authority of the *Times Film* case," (Appendix C, p. App. 24, *infra;* 197 A. 2d, at 235), the Court of Appeals failed to recognize that *Times Film* and the instant prosecution are vastly different—constitutionally different—cases.

*Times Film* was a civil action in equity initiated by a motion picture distributor seeking to challenge Chicago's system of municipal censorship of motion pictures. Plaintiff had tendered to the censorship officials the required license fee, but had declined to submit for censorship the film ("Don Juan") which plaintiff sought to exhibit. When the censorship

officials refused to issue a permit authorizing plaintiff to exhibit the film, plaintiff sought a federal court order compelling issuance of the permit, or, in the alternative, enjoining enforcement of so much of the municipal code as prohibited exhibition of a film without permission of the censoring officials. Plaintiff's position was that it was entitled to exhibit the film in question, whatever its content, subject only to subsequent criminal prosecution under Illinois' laws against pornography. The federal district court and the federal court of appeals concluded that the case posed no justiciable issue. This Court, on certiorari, found that there was a justiciable issue, and addressed itself to the merits. And this Court carefully delineated the issue before it (365 U.S. at 46):

> Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone we decide.

Having so delineated the issue, this Court resolved it adversely to plaintiff (365 U.S. 46, 47):

> . . . [T]here is not a word in the record as to the nature and content of "Don Juan." We are left entirely in the dark in this regard, as were the city officials and the other reviewing courts. Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. . . .

> Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill. Rev. Stat. (1959), c. 38, § 470, and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment. . . . Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of such an evil, previous restraint cannot be justified. With this we cannot agree.

The instant case comes before this Court in an entirely different posture, and presents issues of very different dimension. In the instant case, the moving party is the state, which seeks to sustain a criminal judgment against appellant. In the instant case, appellant does not claim—as petitioner claimed in *Times Film*—"complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" 365 U.S. at 46.[4] In the instant case it cannot be said, as

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[4] That this Court's statement of the issue in *Times Film* accurately reflects the position asserted by petitioner before this Court is evident from the following colloquies which took place on the oral argument on *Times Film*:

> Justice Harlan: What you are saying, I gather, is that on the assumption this film which we haven't got is the hardest sort of hard core pornography, that the State of Illinois cannot deal with you through a licensing program, but that it has got to let you exhibit and then prosecute you if you violate the criminal law; is that it?
>
> Mr. Bilgrey: Mr. Justice Harlan, if I may be permitted to

this Court properly said in *Times Film,* that "there is not a word in the record as to the nature and content" of the film sought to be exhibited, or that the members of this Court "are left entirely in the dark in this regard, as were the city officials and other reviewing courts." 365 U.S. at 46, 47. In the instant

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expand on that, we are saying that to a certain degree that we are not suggesting what remedies the state can have.

Justice Harlan: Isn't that your whole case? Isn't that what you are here about?

Mr. Bilgrey: Well, I believe that that is a correct statement, Mr. Justice Harlan. . . . (Transcript of oral argument, pp. 11-12.)

• • • •

Justice Frankfurter: I am not suggesting any presumption regarding this particular undisclosed film. What I am suggesting is a legal proposition, if I follow your argument at all, that for purposes of the question before the Court, it is a matter of indifference what the character or quality or message or whatever you may say about a film, it is a matter of indifference.

It may be at once the most notable and noble picture, or it may be the vilest of pictures. From the point of view of the question before the Court, that is a matter of indifference.

Mr. Bilgrey: I think it is. I think that is correctly stated, Mr. Justice Frankfurter.

Justice Frankfurter: Very well. (Transcript of oral argument, p. 25)

• • • •

Justice Whittaker: I am asking you—I am not hypothetical: I am on concrete cases here.

I am asking you if by this very suit you are not asking the City to issue a license to show the film, whether or not it is obscene.

Mr. Mikva: Whether or not it is obscene because there is no reason to assume that it is obscene.

Justice Whittaker: Well, is there a reason to assume that it is not?

Mr. Mikva: No; and, therefore, it is the same thing as a printing press or any other form of communication. You make no assumption about it. . . . (Transcript of oral argument, p. 86)

• • • •

See also pp. 5, 6, and 8 of the transcript of oral argument.

case, the film in question has been exhibited, (E. 44), is in the record, (E. 31), and has been viewed by the trial court. (E. 44.) Moreover—and this alone decisively differentiates this case from *Times Film*—in the instant case, as the Court of Appeals itself observed, the State of Maryland acknowledged that the film in question "*would have been approved had it been submitted for licensing.*" Appendix C, p. 20, *infra;* 197 A.2d, at 234 (emphasis added).

In short, in the instant case the State of Maryland has visited criminal punishment on one whose sole act has been to exhibit a film which, *as the state concedes,* the state was without legal power to proscribe. Thus the very issue tendered and decided in *Times Film*—"whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" (365 U.S. at 46)[5] is absent here. Here the State of Maryland seeks to punish appellant for exhibiting a motion picture which the state has conceded to be unobjectionable.

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[5] Subject only to "the invocation of criminal process under the . . . pornography statute . . . and then only after a transgression." 365 U.S. at 49. This Court has since reiterated the limited nature of the *Times Film* decision: "The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.*" *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 n. 10 (emphasis by this Court).

**B. To impose criminal penalties on appellant for exhibiting a concededly proper film directly infringes upon his rights under the First and Fourteenth Amendment.**

The asserted justification for the limited prior restraint in *Times Film* was the special character of the motion picture medium. This special character did not serve to take motion pictures outside the ambit of constitutional rights of free expression, but it was said to support a system of restraint which has, in American constitutional jurisprudence, no approved analogue in the regulation of speech and the press. 365 U.S. at 49-50; cf. *Burstyn* v. *Wilson*, 343 U.S. 495, 502-03, 504-05. Nor could motion pictures be so restrained if disseminated via the airwaves, *Allen B. Dumont Labs* v. *Carroll*, 184 F. 2d 153 (C.A. 3, 1950), cert den. 340 U.S. 929.

Appellant, with all deference, views this Court's holding in *Times Film* as inharmonious with this Court's other holdings with respect to questions of prior restraint. As this Court held in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."

If *Times Film* were overturned, as appellant believes it should be, appellant's conviction would of course be set aside. Yet, as indicated above, appellant submits that even if *Times Film* survives undisturbed, the Court's holding in that case—since characterized by this Court as a refusal to find that "a prior re-

straint was necessarily *unconstitutional under all circumstances," Bantam Books,* supra, at 70, n. 10—does not support a criminal conviction for exhibiting a motion picture under the *acknowledged circumstance* that the motion picture is unobjectionable. cf. *Smith* v. *California*, 361 U.S. 147—in which *Burstyn* is cited with approval—at 152:

> "But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene;"

It remains to show that to impose criminal penalties for exhibiting a concededly legitimate motion picture is unconstitutional.

Once it is granted that, as this Court has many times held, the exhibition of non-obscene motion pictures is within the ambit of the First and Fourteenth Amendments (see, *e.g., Burstyn* v. *Wilson, supra; Kingsley Pictures Corp.* v. *Regents,* 360 U.S. 684; *Smith* v. *California, supra;* and *Times Film* itself), it would hardly seem open to argument that a state cannot make criminal the act of exercising the acknowledged constitutional right.

Nor does the state's case draw strength from an attempt to define the offense charged in a different way—as by arguing that appellant's crime lay in exhibiting "Revenge at Daybreak" without submitting the film to the Maryland Motion Picture Censor Board for that Board's prior approval of the proposed showing. For here, to repeat, appellant's film is conceded to be one which the Board could not have lawfully denied appellant the right to exhibit. And

so the state is, presumably, remitted to contending that it was entitled to require the footless act of prior submission—with its attendant costs to appellant in fees, and in delay (see *infra*, Point II)—merely as a way of assuring that other films, the content of which is unknown, would continue to be funneled through the Motion Picture Censor Board in the manner contemplated by Article 66A, § 2, of the Maryland Code.

But the argument will not wash. It fails, as a comparable argument failed, in the face of claims of personal liberty on a par with the rights protected by the First Amendment, in *Ex Parte Endo,* 323 U.S. 283. There, it will be recalled, the United States sought to resist the release from a World War II relocation center of an American citizen of Japanese ancestry whose loyalty the government conceded. Miss Endo could not be released, in the government's view, until a program for her planned relocation in an approved area of the country had been arrived at: "The success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation. . . ." 323 U.S., at 297. But this Court held that Miss Endo was entitled to immediate release (323 U.S., at 302):

> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort

against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded.

In the instant case, even if we assume (as appellant does, for purposes of argument, though he would also challenge the assumption) that the claimed authority to exclude certain films in advance is justified, the authority is exhausted when the legitimacy of the film sought to be exhibited is conceded. To hold otherwise—to permit appellant's conviction to stand—would be to accord appellant the curious honor of being the first American in the nation's history who was branded a criminal for exercising rights conceded to be indubitably his under the First Amendment.

## II.

**In seeking to channel appellant into submitting "Revenge at Daybreak," a concededly legitimate film, to a censorship process costly to appellant both in dollars and in time, the State of Maryland was seeking to impose on appellant a dual infringement of his constitutional right to untrammeled and immediate public exhibition of his film.**

### A. The cost to appellant in dollars.

If appellant had submitted "Revenge at Daybreak," the film he proposed to exhibit, to the Maryland Motion Picture Censor Board, the fee demanded of him would have been on the order of thirty dollars. (E. 40.) The cost to appellant is not the total cost: Fees would be exacted for each supplemental print of "Revenge at Daybreak".[6]

Assuming the continued vitality of *Times Film,* it is certainly arguable that the state can exact a license fee approximately commensurate with the administrative cost of maintaining a valid system of prior censorship.[7] But such an argument, whatever its intrinsic validity, is beside the point presented by appellant's case. For the doctrine of *Times Film* is

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[6] During the fiscal year 1962, the Board processed and collected fees on 653 original films, 526 re-issue films, and on 5,504 duplicate prints. (E. 23)

[7] But it bears remembering that in *Times Film* the validity of the license fee was not at issue; petitioner, having tendered the demanded fee, but not the film, had taken the question of the fee out of the case.

meaningful only as to films with respect to whose content the censoring "officials and the . . . reviewing courts" are "entirely in the dark." 365 U.S., at 46-7. In the present case, appellant proposed to exhibit a film conceded to be unobjectionable.

Viewed in this posture, it is evident that what Maryland sought to do—through the *in terrorem* impact of its criminal process, waiting in the wings—was to coerce appellant into payment of a fee to subsidize a state administrative procedure which was, *as to appellant*, constitutionally unjustifiable.

The thirty dollars which would have been exacted of appellant, had he submitted his film, would have been an inspection fee taken from him at the toll gate before he could travel the highway beyond. But, in appellant's case, it is conceded that appellant's vehicle—"Revenge at Daybreak"—was, constitutionally speaking, without blemish. Wherefore, appellant was entitled to travel the highway without charge. No other conclusion can be squared with this Court's unbroken line of cases striking down taxes on the exercise of First Amendment rights. *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Jones* v. *Opelika*, 319 U.S. 103; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Follett* v. *McCormick*, 321 U.S. 573.

Needless to add, this conclusion is not altered by the fact that a payment of only thirty dollars (together with submission of the film) would have saved appellant the criminal penalties now sought to be visited upon him. In *Follett*, the daily license cost but a dollar; and an entire year's license could have been had for fifteen dollars. Indeed, as Madison in-

sisted in his memorable Remonstrance against money exactions to support religion, "it is proper to take alarm at the first experiment on our liberties. . . . The same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever." See *Everson* v. *Board of Education,* 330 U.S. 1, 33, n. 29 (dissenting opinion). The First Amendment knows no rule of *de minimis.*[8]

**B. The cost to appellant in time.**

Rights of free expression, like rights to the equal protection of the laws, are "personal and present." *McLaurin* v. *Oklahoma,* 339 U.S. 639. To delay rights of free expression, as to delay the claims of justice, is to deny them. Cf. *Staub* v. *City of Baxley, supra; Niemotko* v. *Maryland,* 340 U.S. 268; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Schneider* v. *State,* 308 U.S. 147; *Lovell* v. *Griffin, supra.*

Had appellant submitted "Revenge at Daybreak," a concededly permissible motion picture, to the Motion Picture Censor Board, that Board would, under Rule 4 of its Rules, have consumed between two and three days in reaching the fore-ordained conclusion that appellant was constitutionally entitled to exhibit the motion picture to the public. (E. 4.)

Two-to-three days of delay in exhibiting a motion picture may be a tolerable burden where it serves

[8] Were it otherwise, it could be argued that the fact that, in the instant case, appellant was only fined twenty-five dollars would deprive him of standing to appeal to this Court.

some arguably valid state purpose—where, for example, two or three days must be consumed in pursuing censorship procedures whose validity is supported by this Court's holding in *Times Film*. But where, as here, it is manifest that with respect to a particular motion picture no review procedure is needed, or can constitutionally be imposed, then *any* significant delay—like *any* monetary exaction—becomes an unconstitutional obstacle to the exercise of First Amendment rights.

The more so is this true when it is recognized that the two-to-three days required by the Motion Picture Censor Board presumes that the Board will recognize the innocence of each unobjectionable film it processes. The actual fact is to the contrary. Because the Motion Picture Censor Board is a board of censorship, it tends to censor. And it tends to censor films which are, in the perspective of the law, beyond its reach. But before the law catches up with the Board—as the Maryland Court of Appeals did, for example, in *State Board of Motion Picture Censors* v. *Times Film*, 212 Md. 454, 129 A.2d 833; *United Artists* v. *Maryland State Board of Censors*, 210 Md. 586, 124 A.2d 292; and *Fanfare Films, Inc.* v. *Motion Picture Censor Board*, 197 A.2d 839, not days but years go by in which an exhibitor's constitutional rights have been irretrievably lost. And of course one of the reasons this is true is because the statutory standards within which the Maryland Motion Picture Censor Board operates are so capricious as to invite maximum intervention by the censoring officials. Yet the Court of Appeals of Maryland declined, in the instant case, to let appellant challenge the statutory standards. Cf.

*Thornhill* v. *Alabama*, 310 U.S. 88 (cited with approval in *Bantam Books supra*, at 66) at 97, 98:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. . . . *One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it.* (emphasis added)

One can avert one's gaze from the standards fashioned for the Maryland Motion Picture Censor Board by the Maryland Legislature. But one cannot blink at the impact of lengthy censorship proceedings on those who propose publicly to exhibit a film which, concededly, no American government official can constitutionally interfere with.

In this case Maryland sought to use its criminal process as a device to compel appellant to undergo the concededly useless process of censorship—a process which could subserve only the ends of augmenting state revenues[9] and delaying appellant in the free exercise of his constitutional rights. Maryland sought, through the threat of criminal prosecution, to compel appellant to submit his film to censorship. Appellant would not submit, and therefore he was prosecuted. His conviction cannot coexist with the First and Fourteenth Amendments.

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[9] Had appellant's film been held objectionable by the Board, he would also have had to incur substantial added costs in appellate litigation—as, of course, he has had to on appeal from the instant conviction.

## Conclusion

Professor Bickel, writing after *Times Film,* has put his finger on the issues not reached by that case (BICKEL, THE LEAST DANGEROUS BRANCH, pp. 137-38):

> The most crucial present-day difference between prior restraints and subsequent punishments concern what happens to the film while litigation takes its course. If it were necessarily true that a film may be exhibited—at the defendant's peril, to be sure, but nevertheless exhibited—throughout the period of criminal litigation and appellate judgment, while it may not be exhibited during the period of civil litigation following denial of a license, then the difference would indeed be major. But this is far from a necessary consequence. Mr. Freund, for example, has strongly urged that the act of disobeying the censor and showing the film without a license should be held not to be a punishable offense if the exhibitor wins the ultimate litigation. This suggestion would equalize matters.

The view espoused by Professor Freund,[10] and endorsed by Professor Bickel, should entail the corollary view that one who declines to submit to censorship should also prevail if, in the resultant criminal prosecution, the state cannot demonstrate the impropriety

[10] Professor Freund's thesis is stated in *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 538-39 (1951), an article cited with approval by this Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436. See also Professor Emerson's study, *The Doctrine of Prior Restraint*, in 20 LAW & CONTEMP. PROB. 648.

of the exhibited motion picture. But, however that may be, it must entail that corollary where, as in the instant case, the state not only does not claim impropriety but *concedes the contrary.* To acknowledge appellant's constitutional right of free expression and to stamp him a criminal for exercising that right would take us back to a never-never land of jurisprudence unimagined even by the great author of *Areopagitica.*

Wherefore, it is respectfully urged that probable jurisdiction be noted and that the judgment below be reversed.

Respectfully submitted,

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## Appendix A

## ACT OF 1922, CHAPTER 390

(As amended by the Acts of the General Assembly of Maryland of 1927, 1929, 1939, 1941, 1945, 1947, 1955 and 1960.)

1. Definitions.

The word "film" as used in this article shall be construed to mean what is usually known as a motion picture film and shall include any film shown with or by new devices of any kind whatsoever, such as slot or coin machines, showing motion pictures. The word "view" in this article shall be construed to mean what is usually known as a stereopticon view or slide. The word "person" shall be construed to include an association, copartnership or a corporation. (An. Code, 1951, 1; 1939, 1; 1924, 1; 1922, ch. 390, 1; 1941, ch. 28.)

2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board. (An. Code, 1951, 2; 1939, 2; 1924, 2; 1922, ch. 390, 2.)

3. Creation of Board of Censors.

The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors under this article. One member of the Board shall be chairman, one member shall be vice-chairman and one member shall be secretary. They shall be appointed by the Governor, by and with the advice and consent of the Senate, for terms of three years. Those first appointed under this article shall be appointed for three years, two years and one year, respectively; the respective terms to be designated by the Governor. (An. Code, 1951, 3; 1939, 3; 1924, 3; 1922, ch. 390, 3; 1939, ch. 430.)

4. Vacancy in Board.

A vacancy in the membership of the Board shall be filled for the unexpired term by the Governor. A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the Board. (An. Code, 1951, 4; 1939, 4; 1924, 4; 1922, ch. 390, 4.)

5. Seal.

The Board shall procure and use an official seal, which shall contain the words "Maryland State Board of Censors," together with such design engraved thereon as the Board may prescribe. (An. Code, 1951, 5; 1924, 5; 1939, 5; 1924, 5; 1922, ch. 390, 5.)

6. Board to examine, approve or disapprove films; what films to be disapproved.

(a) Board to examine, approve or disapprove films.—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) What films considered obscene.—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) What films tend to debase or corrupt morals.—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) What films tend to incite to crime.—For the purposes of this article, a motion picture film or view

shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs. (An. Code. 1951, 6; 1939, 6; 1924, 6; 1922, ch. 390, 6; 1955, ch. 201.)

7. Certificate of approval or license.

Upon each film that has been approved by the Board, there shall be furnished by the Board, the following certificate or statement: "Approved by the Maryland State Board of Censors No. ....." and the Board shall also furnish a certificate or license in writing to the same effect, which certificate shall be the license for such film unless and until the same shall be revoked by said Board, and said certificate or license shall be exhibited by the holder thereof to any member of the Board or employee thereof upon demand. In the case of motion pictures, such statements shall be shown on the screen to the extent of approximately four (4) feet of film. Upon each film examined and approved by the Board, and upon each duplicate or print thereof, the Board shall stamp, by perforation or otherwise, the serial number and such other initials, words or designs as it may prescribe, the serial number to correspond to the number on the certificate of approval issued by the Board to be shown upon the screen. In the case of slides or views, the Board shall furnish in writing a similar certificate or license and each set of views shall have at least two slides or views shown with a similar

statement. Upon satisfactory proof being submitted to the Board that the certificate of approval attached to any film that has been examined and approved by the Board, has been lost, mutilated or destroyed, the Board shall have power in its discretion, and upon payment in advance of the fee prescribed by 11 of this article, to issue a duplicate certificate of approval. Any certificate or licensee issued as herein provided may be revoked by the Board for any reason which would have justified the Board in refusing to issue such license, or for any violation of law by such applicant in securing such license, or in advertising or using the film or view so licensed. Thereafter any such film may again be submitted to the Board for approval and license. (An. Code, 1951, 7; 1939, 7; 1924, 7; 1922, ch. 390, 7; 1929, ch. 555, 7.)

8. Record of Examinations.

The Board shall keep a record of all examinations made by it of films or views; noting on the record all films or views which have been approved, and those which have not been approved, with the reason for such disapproval. (An. Code, 1951, 8; 1939, 8; 1924, 8; 1922, ch. 390, 8.)

9. Report to Governor.

The Board shall report, in writing, annually, to the Governor, on or before the first day of September of each year. The report shall show:

(1) A record of its meetings, and a summary of its proceedings during the year immediately preceding the date of the report.

(2) The results of all examinations of films or views.

(3) A detailed statement of all prosecutions for violations of this article.

(4) A detailed and itemized statement of all the incomes and expenditures made by or in behalf of the Board.

(5) Such other information as the Board may deem necessary or useful in explanation of the operations of the Board.

(6) Such other information as shall be requested by the Governor. (An. Code, 1951, 9; 1939, 9; 1924, 9; 1922, ch. 390, 9; 1945, ch. 66.)

10. Oath and bond of officers of Board.

The chairman, vice-chairman and secretary shall, before assuming the duties of their respective offices, take and subscribe the oath prescribed by the Constitution of the State of Maryland, and each shall annually give corporate surety bond to the State of Maryland in such sum as the State Comptroller may prescribe, with condition that he faithfully perform the duties of his office and account for all funds received under color of his office. (An. Code. 1951, 10; 1939, 10; 1924, 10; 1922, ch. 390, 10; 1927, ch. 46; 1945, ch. 400.)

11. Fees.

For the examination of each and every one thousand feet (1,000′) of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of three dollars ($3.00), where the film averages

sixteen (16) frames or less to the foot, and a fee of four dollars ($4.00) where the film averages more than sixteen (16) frames to the foot, and a fee of one dollar and twenty-five cents ($1.25) for the approval of every duplicate of one thousand feet (1,000′) or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of two dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of two dollars ($2.00) for each one hundred (100) views or fractional part thereof, and for the approval of duplicate views or prints thereof a fee of one dollar ($1.00) for each one hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee of one dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of 7 of this article; and the Board shall account for any pay all fees received by it into the State treasury. (An. Code, 1951, 11; 1939, 11; 1924, 11; 1922, ch. 390, 11; 1929, ch. 555, 11; 1941, ch. 778; 1955, ch. 137; 1963, ch. 720.)

12. Offices, expenses and compensation of Board.

The Board shall provide adequate offices and rooms in which properly to conduct the work and affairs of the Board in the City of Baltimore and the State of Maryland, and the expenses thereof, as well as any other expenses incurred by said Board in the necessary discharge of its duties, and also the salaries of

the members of the Board, each of whom shall receive such compensation as shall be provided in the State budget, and each member of the Board shall be reimbursed for actual and necessary expenses incurred in furtherance of the Board's business within the State of Maryland, such as mileage, at the rate established by the Board of Public Works, hotel bills, the costs of meals and any other incidental expenses incurred in attending meetings or carrying out the other provisions of this article, such reimbursement not to exceed three thousand ($3,000.00) dollars per annum for any member of the Board. (An. Code, 1951, 12; 1939, 12; 1924, 12; 1922, ch. 390, 12; 1941, ch. 727; 1947, ch. 257; 1960, ch. 47.)

13. Disposition of fines.

All fines imposed for the violation of this article shall be paid into the State treasury. (An. Code, 1951, 13; 1939, 13; 1924, 13; 1922, ch. 390, 13.)

14. Right of entry.

Any member or employee of the Board may enter any place where films or views are exhibited; and such member or employee is hereby empowered and authorized to prevent the display or exhibition of any film or view which has not been duly approved by the Board. (An. Code, 1951, 14; 1939, 14; 1924, 14; 1922, ch. 390, 14.)

15. Obscene, indecent, etc., advertisements.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with

any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such character that its exhibition would tend to corrupt morals or incite to crime. If any such potser, banner, or similar advertising matter is so exhibited or offered to another for exhibition it shall be sufficient ground for the revocation of the certificate or license for said film issued by the Board. (An. Code, 1951, 15; 1939, 15; 1924, 15; 1922, ch. 390, 15.)

16. Enforcement; rules.

This article shall be enforced by the Board. In carrying out and enforcing the purpose of this article, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Maryland. (An. Code, 1951, 16; 1939, 16; 1924, 16; 1922, ch. 390, 16.)

17. Film submitted for approval; false statements.

Every person intending to sell, lease, exhibit or use any film or view in the State of Maryland, shall furnish the Board, when the application for approval is made, a description of the film or view to be exhibited, sold or leased, and the purposes thereof; and shall submit the film or view to the Board for examination; and shall furnish a written statement or affidavit that the duplicate film or view is an exact copy of the original film or view as submitted for examination to the Board, and that all eliminations, changes or rejections made or required by the Board in the original film or view have been or will be made in the duplicate. Any person who shall make

any false statement in any such written statement or affidavit to the Board shall, upon conviction thereof summarily before a justice of the peace, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, and any certificate or license issued upon a false or misleading affidavit or application shall be void ab initio; and any change or alteration in a film after license, except the elimination of a part or except upon written direction of the Board, shall be a violation of this article and shall also make immediately void the license therefor. (An. Code, 1951, 17; 1939, 17; 1924, 17; 1922, ch. 390, 17.)

18. Interference with Board.

It shall be unlawful for any person to hinder or interfere in any manner with any member or employe of the Board while performing any duties in carrying out the intent or provisions of this article. (An. Code, 1951, 18; 1939, 18; 1924, 18; 1922, ch. 390, 18.)

19. Notice of elimination or disapproval; re-examination; appeals.

If any elimination or disapproval of a film or view is ordered by the Board, the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of

appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals. (An. Code, 1951, 19; 1939, 19; 1924, 19; 1922, ch. 390, 19; 1955, ch. 201.)

20. Penalties in general.

Any person who violates any of the provisions of this article for which a specific penalty is not provided and is convicted thereof summarily before any magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shall be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment in the prison of the county, or in Baltimore City, where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the magistrate or justice of the peace to the Board, and by it paid into the State treasury. (An. Code, 1951, 20; 1939, 20; 1924, 20; 1922, ch. 390, 20.)

21. Particular penalties; appeal.

Any person who shall exhibit in public any misbranded film or film carrying official approval of the Board which approval was not put there by the action of the Board or any person who shall attach to or use in connection with any film or view which has not been approved and licensed by the Maryland State Board of Censors, any certificate or statement in the form provided by 7 hereof or any similar certificate,

statement or writing, or any person who shall exhibit any folder, poster, picture or other advertising matter, which folder, poster, picture or other advertising matter is obscene, indecent, sacrilegious, inhuman or immoral or which tends to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the Board, shall be guilty of a misdemeanor, and upon conviction summarily before a justice of the peace, shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisonment for not over thirty days, or be both fined and imprisoned in the discretion of the said justice of the peace. In addition to the above penalties, the Board may also seize and confiscate any misbranded film.

In all cases arising under this section there may be an appeal from the decision of the magistrate or justice of the peace where the fine imposed is in excess of fifty dollars ($50.00), or where the penalty imposed includes any term of imprisonment whatever. (An. Code, 1951, 21; 1939, 21; 1924, 21; 1922, ch. 390, 20A.)

22. Failure to display approved seal.

If any person shall fail to display or exhibit on the screen the approved seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily before any magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county, or in Baltimore City, where such offense was committed, for not less than two days and not more than five days. (An. Code, 1951, 22; 1939, 22; 1924, 22; 1922, ch. 390, 21.)

23. Exemptions; permit.

This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning. The Board may, in its discretion, without examination thereof, issue a permit for any motion picture film, intended solely for educational, fraternal, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit. (An. Code, 1951, 23; 1939, 23; 1924, 23; 1922, ch. 390, 22.)

24. Severability.

The several sections and provisions of this article are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this article. (An. Code, 1951, 24; 1939, 24; 1924, 24; 1922, ch. 30, 23.)

25. Money deposited for future rental of film—In general.

Whenever money shall be deposited or advanced on a contract for the future use or rental of motion picture films as security for the performance of the contract or to be applied to payments upon such contract

when due, such money, with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit or advance and shall be considered a trust fund in possession of the person with whom such deposit or advance shall be made, and shall be deposited in a bank or trust company by the person receiving the same, and shall not be commingled with said person's other funds or become an asset of such person or trustee, and the person so paying the same shall be notified by the bank or trust company in which said funds are deposited. (An. Code, 1951, 25; 1939, 25; 1924, 25; 1922, ch. 477.)

26. Same—Waiver.

No waiver of the provisions of 25 shall be made so as to evade the provisions of said 25 and any such waiver if so made, shall be considered null and void. (An. Code, 1951, 26; 1939, 26; 1924, 26; 1922, ch. 477.)

## Appendix B

CRIMINAL COURT OF BALTIMORE

### MEMORANDUM OPINION

(Filed May 24, 1963)

SODARO, J.

The defendant is charged under indictment with violation of Article 66A Section 2 of the Annotated Code of Maryland, which reads as follows:

"Moving Pictures.

Sec. 2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit, or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

The facts are not in dispute in that the defendant on November 1, 1962, did publicly show a certain motion picture entitled "Revenge at Daybreak", at the Rex Theatre in Baltimore City, without having previously submitted the film for licensing and approval by the State Board of Censors.

The defendant contends that Article 66A, upon its face, violates the First and Fourteenth Amendments of the United States Constitution in that it imposes an invalid infringement upon the exercise of the right of free speech and press; that it is invalid as con-

trary to the Due Process Clause of the Fourteenth Amendment, specifically in that the standards pursuant to which speech is abridged, set forth in Section 6 of said Article, are vague and that the standards fail to advise the defendant of those forms of speech which the State purportedly proscribes; that Article 66A, upon its face, violates Article 40 of the Maryland Declaration of Rights and is specifically contrary to the Due Process Clause of Article 23 of the Declaration of Rights of Maryland in that the standards contained in Section 6 of said Article, which permit the depriving of defendant's life, liberty or property, are couched in vague language which fail to apprise the defendant of the conduct the standard seeks to proscribe; that said Article is invalid as contrary to, and imposes an unlawful infringement upon the Interstate Commerce Clause of the United States Constitution, and specifically that it imposes a tax and/or license fee upon the right of the freedom of speech and press; that it is invalid and void in that it is an unlawful and illegal delegation of legislative authority to an administrative agency.

These grounds of attack collectively simply challenge the Censor's basic authority and do not go to any statutory standards or procedural requirements as to the submission of the film. It is not the contention of the State that the film in question violates any of the standards set out in the Statute.

After consideration of argument of counsel and briefs which were filed by both sides, I have concluded that Article 66a, and in particular Section 2 thereof which is the basis of the charge, is valid and constitutional. Although this challenged Section imposes a

previous restraint, the ambit of constitutional protection does not include complete and absolute freedom to exhibit any and every kind of motion-picture and this challenged provision, requiring the submission of films prior to their public exhibition, is not, on the grounds set forth by the Defendant, void on its face.

The defendant's broadside attack on the constitutionality of this Section is similar to that made in the case of Times Film Corporation v. City of Chicago, Et Al, 365 U.S. 43, in which Mr. Justice Clark, speaking for the majority court, said "Certainly, petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that—aside from any consideration of the other exceptional cases mentioned in our decisions—the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech. It is not for this court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances."

Consequently, the Defendant's Motion for Judgment of Acquittal is hereby denied.

## Appendix C

IN THE COURT OF APPEALS OF MARYLAND

No. 144

September Term, 1963

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RONALD L. FREEDMAN

v.

STATE OF MARYLAND

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Henderson
Hammond
Prescott
Marbury
Sybert,
JJ.

OPINION BY SYBERT, J.

Filed: February 10, 1964

In order to test the constitutionality of the Maryland motion picture censorship statute, the appellant invited arrest by exhibiting the motion picture film "Revenge at Daybreak" at a theatre in Baltimore City without first having submitted the film to the Maryland State Board of Motion Picture Censors for approval and licensing, as required by Code (1957), Art. 66A, Sec. 2.[1] He was indicted and tried in the

[1] "§2. It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board."

Criminal Court of Baltimore for violation of Sec. 2, and convicted after his timely motions for judgment of acquittal were denied. He now appeals.

The appellant has attempted, both in the court below and on this appeal, to attack the constitutionality of Art. 66A in its entirety, even though he was tried and convicted only for violation of Sec. 2. The principal contention is that the statute is void on its face as an unconstitutional infringement upon free speech and press violative of the First Amendment to the United States Constitution (made applicable to the States under the Fourteenth Amendment) and of Art. 40 of the Maryland Declaration of Rights. The appellant then argues that in the defense of a criminal prosecution under Sec. 2 of Art. 66A he is entitled to challenge the constitutionality of the entire statute "since he is charged with a violation under the Act." Acting upon that premise, he proceeds to attack separately what he asserts are constitutional infirmities of certain features of the Act. His claims are that the Act fails to provide adequate procedural safeguards (although he noted that Sec. 19 of Art. 66A affords an appeal to the Baltimore City Court and thence to this Court); that the standards established by Sec. 6[2] of the Act are vague and hence

[2] §6. (a) *Board to examine, approve or disapprove films.*—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. • • •

"(b) *What films considered obscene.*—For the purpose of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

invalid as construed and applied; that the statute deprives him of equal protection of the law in that newsreels and noncommercial exhibitors such as educational, charitable, fraternal and religious organizations are excluded from the operation of the Act; and that the fee charged for the inspection and licensing of a film constitutes an invalid tax upon the exercise of freedom of speech.

The State maintained below and here that the statute is not void on its face, and that since the appellant did not submit his film to the Board for approval and licensing he lacks standing to challenge any provision or requirement of Art. 66A, except the provisions of Sec. 2, for violation of which he was convicted. The trial court agreed with the position of the State. Parenthetically, it is noted that neither the appellant nor the State even suggests that the film "Revenge at Daybreak" would violate any of the standards set out in the statute, and the State conceded that it would have been approved had it been submitted for licensing.

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"(c) *What films tend to debase or corrupt morals.*—For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) *What films tend to incite to crime.*—For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

We shall first consider the appellant's main attack —that the Maryland statute is void on its face as an unconstitutional prior restraint imposed upon the freedoms of speech and press protected against State action by the First and Fourteenth Amendments and by Art. 40 of the Maryland Declaration of Rights.

The Supreme Court of the United States, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 96 L.Ed. 1098 (1952), held that motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, affords to speech and the press, and struck down the use of "sacrilegious" as a permissible censorship standard. However, the Court intimated that some form of censorship might be permissible when it said (at p. 502 of 343 U.S.): "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas." The Court further stated (*ibid.*) in considering the argument that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression: "If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." Subsequent to *Burstyn*, a number of film censorship cases reached the Supreme Court which involved questions of standards. The films in those cases had all been submitted to the appropriate au-

thorities and permits for their exhibition were refused because of their content. Thus those cases are not apposite here and will not be reviewed.

In 1961, in *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 5 L.Ed. 2d 403, the question whether or not the constitutional guaranty of freedom of speech and of the press was violated by prior censorship was placed squarely before the Supreme Court. The appellant in that case, a motion picture exhibitor, challenged the validity of an ordinance of the City of Chicago which, as a prerequisite to public exhibition, required the submission of films to a censor. The exhibitor applied for a permit and tendered the license fee, as required by the ordinance, but refused to submit the film for examination. The permit was denied solely because of the refusal to submit the film. The exhibitor sought injunctive relief, challenging the ordinance on the ground that the First Amendment guaranties were violated by the prior censorship requirement, thus rendering the ordinance void on its face. The Supreme Court found that the attack was an attempt to have the Court hold that the public exhibition of motion pictures must be permitted under any circumstances, and that previous restraint cannot be justified regardless of the capacity of motion pictures for evil, or the extent thereof. In rejecting that contention, the Court said (pp. 49-50 of 365 U.S.):

> "With this we cannot agree. We recognize in *Burstyn, supra,* that 'capacity for evil . . . may be relevant in determining the permissible scope of community control,' at p. 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method,'

> we said, 'tends to present its own peculiar problems.' At p. 503. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that —aside from any consideration of the other 'exceptional cases' mentioned in our decisions —the State is stripped of all constitutional power to prevent in the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, *absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.*" (Emphasis supplied.)

In affirming the dismissal of the exhibitor's complaint, the Supreme Court held that the requirement of Chicago's ordinance for submission of films prior to their public exhibition was not void on its face as an invasion of the constitutional guaranties.

The Supreme Court's refusal to strike down all prior censorship of motion pictures was recognized and restated last year in *Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58, 9 L.Ed. 2d 584 (1963). In that case the court found unconstitutional a Rhode Island agency formed to screen books and magazines and to recommend the prosecution of violators of appropriate statutes, on the ground that the Act creating the agency did not require proper judicial superintendence. However, the court said, in Footnote 10 of *Bantam* (at p. 70 of 372 U.S.):

> "Nothing in the Court's opinion in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, is incon-

> sistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.* In declining to hold prior restraints unconstitutional *per se,* the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures." (Emphasis by Court.)

We conclude that on the authority of the *Times Film* case, *supra,* the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments. However, the appellant also argues that the statute is in conflict with Art. 40 of the Maryland Declaration of Rights, which provides:

> "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

We find no merit in this argument. The right to speak and print, protected by Art. 40, is not absolute. This Court has held that the liberty of the press does not include the privilege of taking advantage of the incarceration of a person accused of crime to photograph his face and figure against his will. *Ex Parte Sturm,* 152 Md. 114, 120, 136 Atl. 312 (1927). The guaranty of freedom of speech and press ordained in

Art. 40 would appear to be, in legal effect, substantially similar to that enunciated in the First Amendment, and it is significant that Art. 40 has been treated by this Court as in *pari materia* with the First Amendment. See, for example, *Police Comm'r* v. *Siegel, etc., Inc.*, 223 Md. 110, 128, 162 A. 2d 727 (1960); *Baltimore* v. *A. S. Abell Co.*, 218 Md. 273, 289, 145 A. 2d 111 (1958). We therefore see no reason why Art. 40 should be interpreted differently from the First Amendment.

We think the State is correct in its contention that since the appellant chose to mount his attack on the constitutionality of motion picture censorship in Maryland by refusing to submit his film to the Board as required by Sec. 2 of Art. 66A (for which alone he was indicted), he has restricted himself to an attack on that section alone, and lacks standing to challenge any of the other provisions (or alleged shortcomings) of the statute. The appellant's contention that the entire Act is subject to challange when the State seeks a criminal conviction for failure to comply with a single provision of it is untenable. The indictment did not involve procedures or standards under other sections of the Act, or any of the other matters sought to be raised by the appellant, and thus there was no ripe and justiciable issue as to such matters before the trial court, and there is none before us. Other avenues—such as an action for injunctive or declaratory relief—are open to the appellant for the determination of such issues when he is faced with invasion of his rights.

In *Hammond* v. *Lancaster,* 194 Md. 462, 71 A. 2d 474 (1950), Judge Henderson, for the Court, reviewed the authorities dealing with the matter of standing to seek a judicial determination of a constitutional question in advance of the necessity for its decision. He pointed out that the Supreme Court, in *Federation of Labor* v. *McAdory,* 325 U.S. 450, 89 L.Ed. 1725 (1945), dismissed the writ of *certiorari* which it had issued in a case brought in the Alabama State court against enforcement officers for a declaratory judgment adjudicating the constitutionality of an Alabama Act which, it was contended, violated rights of free speech, due process and equal protection, and was vague and indefinite, and he quoted Chief Justice Stone as saying, " * * * this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' " To the same effect are *Hitchcock* v. *Kloman,* 196 Md. 351, 76 A. 2d 582 (1950); *Tanner* v. *McKeldin,* 202 Md. 569, 580, 97 A. 2d 449 (1953); *Givner* v. *Cohen,* 208 Md. 23, 37, 116 A. 2d 357 (1955), and *Dutton* v. *Tawes,* 225 Md. 484, 171 A. 2d 688 (1961), app. dism. 368 U.S. 345, 7 L.Ed. 2d 342, in the last of which cases Judge Hammond, for the Court, said (at p. 501 of 225 Md.): "In the view we take of the case, however, we think appellants are not entitled to have a declaration as to the constitutionality of the compact in operation. They have not shown that they are engaged in or faced with actual controversy, or that the issues are ripe and justiciable, so as to be able to call upon the courts to exercise the declaratory process. * * *" For the latest case in which this

Court has had occasion to consider the question of standing to raise issues, see *Citizens Comm. v. Anne Arundel Co.*, No. 135, this Term, Md. , A. 2d (1964).

The appellant relies strongly upon the cases of *Staub* v. *Baxley*, 355 U.S. 313, 2 L.Ed. 2d 302 (1958), and *Lovell* v. *Griffin*, 303 U.S. 444, 82 L.Ed. 949 (1938), to support his claim that he has standing to attack provisions of the Act other than Sec. 2. However, these cases are distinguishable. In each, the Supreme Court expressly found that the ordinance involved was void *on its face*, whereas the Chicago ordinance, substantially similar to the Maryland statute, was held not to be void on its face in *Times Film, supra.*

We hold that the requirement of Art. 66A, Sec. 2, that films be submitted to the Censor Board for approval and licensing before public exhibition, is not void on its face and is valid and enforceable. We also hold that, in this case, the appellant had no standing to question other portions of the statute.

JUDGMENT AFFIRMED; APPELLANT TO PAY COSTS.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,

*Appellant,*

v.

STATE OF MARYLAND,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## MOTION TO DISMISS OR AFFIRM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. ------

RONALD L. FREEDMAN,

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STATE OF MARYLAND,

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## MOTION TO DISMISS OR AFFIRM

The State of Maryland, pursuant to Rule 16 of the Revised Rules of this Court, moves (a) to dismiss the appeal herein, taken from the final judgment of the Maryland Court of Appeals, on the ground that no substantial federal question has been raised, or, (b) in the alternative, that the judgment appealed from be affirmed.

### THE LACK OF A SUBSTANTIAL FEDERAL QUESTION IN THE ISSUES PRESENTED

The Appellant herein seeks to challenge the right of the State of Maryland to examine motion picture films prior to licensing such films for exhibition throughout the State.

It is the position of the State of Maryland that the Maryland practice presents no federal question, as the right of the states to examine motion picture films subject to reasonable standards has clearly been affirmed by this Court on many occasions.

Whether or not the Maryland standards are "reasonable" is not properly before this Court, as the Appellant did not submit his film for examination and application of the standards of the Maryland law.

The question presented to this Court is not novel, unique or peculiar. In the opinion of the State of Maryland, this exact question was affirmatively decided by the Court in *Times Film Corporation v. Chicago*, 365 U.S. 43.

## QUESTION PRESENTED

Whether the Maryland Court of Appeals erred in holding that the instant case was controlled by *Times Film Corporation v. City of Chicago*.

## THE STATUTE INVOLVED

The statute here sought to be challenged is Article 66A of the Annotated Code of Maryland (1957 Edition), which is set forth in full at App. A, p. 1 of the Jurisdictional Statement and Brief of the Appellant herein.

## STATEMENT

The Appellant is the operator and manager of the Rex Theatre in Baltimore, Maryland. On November 1, 1962, Appellant advised the Maryland Motion Picture Censor Board of his intention to deliberately violate the law of Maryland by exhibiting at his theatre a film which had not been submitted to the Board for examination or licensing.

**An agent of the Board was present when the film was illegally exhibited and thereafter secured a warrant for Appellant's arrest.**

The Appellant was indicted for a violation of Article 66A, §2, which section states, in its entirety:

> "§2. *Unlawful to show any but approved and licensed film.*
>
> It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board"

Appellant was found guilty and sentenced to pay a fine of $25. From that conviction and sentence he appealed to the Maryland Court of Appeals.

At trial and on appeal, the Appellant sought to attack the right of the State to examine and license motion picture films, and also sought to attack the standards set out in the Maryland law and applied by the Board for such licensure. The trial court and the Maryland Court of Appeals found that the Appellant lacked standing to challenge the standards, or any section of the statute other than the section for violation of which he was indicted and convicted.

From the decision of the Maryland Court of Appeals, affirming his conviction, this appeal is sought.

I.

Whether the Maryland Court of Appeals erred in holding that the instant case was controlled by *Times Film Corporation v. City of Chicago.*

## ARGUMENT

### THE COURT'S DECISION IN *TIMES FILM CORPORATION v. CITY OF CHICAGO*, 365 U.S. 43, IS COMPLETELY DETERMINATIVE OF THE ISSUE PRESENTED IN THE INSTANT CASE.

The factual situations in the instant case and in the case of *Times Film Corporation v. City of Chicago* are strikingly parallel, and the decision of the court in *Times Film* is obviously applicable to the case at hand.

*Times Film* was an action instituted in the United States District Court for the Northern District of Illinois, wherein the plaintiff attempted to challenge an ordinance of the City of Chicago which, as a prerequisite to public exhibition, required the submission of moving picture films to a censor. The ground for the attack was that the constitutional guarantee of freedom of speech was violated by the prior censorship requirement. The District Court dismissed the complaint. *Times Film Corporation v. City of Chicago*, 180 F. Supp. 843. The Court of Appeals for the Seventh Circuit affirmed. *Times Film Corporation v. City of Chicago*, 272 F. 2d 90.

The Court granted certiorari, and affirmed the judgment below. In an opinion by Mr. Justice Clark, the Court held that the ordinance in question was not void on its face.

In *Times*, the Court held that since the exhibitor had refused to submit the film and thus have the standards applied to it, no consideration was required to be given to the validity of the standards set out in the ordinance. The Court noted that the prior motion picture censorship cases which had previously reached the court involved questions of standards. The films in those cases[1] had all

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[1] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777, *supra* ("sacrilegious"); *Gelling v. Texas*, 343 U.S.

been submitted to the authorities and permits for their exhibition were refused because of their content. The Court said:

> "Obviously, whether a particular statute is 'clearly drawn' or 'vague' or 'indefinite,' or whether a clear standard is in fact met by a film are different questions involving other constitutional challenges. * * *."

The court found the petitioner's attack in *Times Film* to be a challenge to the censors' basic authority and an attempt to have the court hold that the public exhibition of motion pictures must be allowed under any circumstances, and that previous restraint cannot be justified regardless of the capacity for, or extent of such an evil.

The court rejected that contention (5 L. Ed. 2d 407):

> "With this we cannot agree. We recognize in Burstyn, 343 U.S. 495, supra, that 'capacity for evil * * * may be relevant in determining the permissible scope of community control,' * * *, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression, Each method,' we said, 'tends to present its own peculiar problems.' * * *. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that — aside from any consideration of the other 'exceptional cases' mentioned in our decisions — the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most

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960, 96 L. Ed. 1359, 72 S. Ct. 1002 (1952) ["prejudicial to the best interest of the people of said City"]; *Commercial Pictures Corp. v. Regents of U. of New York*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286 (1954) ["immoral"]; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286 (1954) ["harmful"]; *Kingsley International Pictures Corp. v. Regents of U. of New York*, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959) ["sexual immorality"].

effective to cope with such a problem, *absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.*" (Emphasis supplied.)

The Supreme Court's approval, in *Times, supra,* of the right of the State to set up standards for the exhibition of motion picture films was restated as recently as February 18, 1963, in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631. The court, in *Bantam,* found unconstitutional a Rhode Island agency created to educate the public concerning any book containing obscene, indecent or impure language, and to investigate and recommend the prosecution of all violations of appropriate ordinances. The court pointed out, however, that nothing in that opinion was inconsistent with its holding in *Times* that prior restraint was not necessarily unconstitutional under all circumstances.

It is the position of the State of Maryland that the Appellant herein finds himself in the same position as the petitioner in the *Times Film* case, *supra.* By failing to submit the film to the Censor Board, and to have the standards set out in the law applied to his film, he leaves himself without sufficient ground on which to make objection to those standards. As the court noted in *Times,* the approved method of attacking such standards is to have them applied, and to appeal from an unsatisfactory treatment of that application.

The State of Maryland submits that obscenity never having been considered within the area of freedom of speech as guaranteed by the First Amendment, and extended to the states by the Fourteenth Amendment, statutes requiring licensing and approval of motion picture films are not void on their face. In dealing with motion

pictures, we are dealing with an area wherein we have the approval, however reluctant, of the Supreme Court of the United States to examine and license films, subject to reasonable standards.

If Appellant chooses to attack those standards, or the application of those standards, then our statute provides a proper means of making protest. §19 of Article 66A (App. 10) sets out ample and effective methods of appeal for any person finding himself aggrieved by the action of the Board in making an elimination from a film or in disapproving a film. The Appellant, Freedman, in fact, has in the past effectively pursued the appellate remedies set out in the statute and this Court may take judicial notice of the successful efforts of other persons to have set aside decisions of the Censorship Board with which they disagreed. See *State Board of Motion Picture Censors v. Times Film*, 212 Md. 454, 129 A. 2d 833, and *United Artists v. Maryland State Board of Censors*, 210 Md. 586, 124 A. 2d 292.

The Appellant seeks to sustain his position by stating that the entire statute is validly under attack merely because he saw fit, in his defense to the charge of violating the provisions of §2, to make known his objection to other provisions of the article. Appellant's election of remedies, or of methods of attack, however appropriate they might seem to him, are not binding on this Court, nor on the State of Maryland, any more than would be the attempt of a party in a criminal case to have monetary damages awarded to him, or the attempt of a plaintiff in a civil case to have criminal penalties applied to the defendant. The Appellant herein has chosen the wrong forum for the attack which he seeks to make on the Maryland Motion Picture Censorship. The laws of Maryland provide a proper forum, and recent decisions of the Court, as in *Times*, as reaffirmed

by *Bantam*, strongly indicate that only by electing to choose the proper avenues of complaint may he be heard.

The State of Maryland believes that the most recent decision of a federal court of appeals on the question of movie censorship strongly affirms our position that he who seeks to complain of the standards or procedures must first show that those standards or procedures have been unfairly applied to him. Within months after the decision of this Court in *Times Film*, another plaintiff in the City of Chicago sought to attack the Chicago ordinance. That petitioner, however, did subject himself to the requirements of the statute and on being denied a license for the film in question (said film being "The Lovers," a film ordered to be shown in Maryland by the Baltimore City Court, on appeal by the Appellant Freedman from a denial of a license by the Censor Board), he then brought an action in the federal district court praying for an order directing the City of Chicago to issue to him a permit to exhibit the film. In that case, *Zenith International Film Corp. v. City of Chicago*, 291 F. 2d 785 (1961), decided on June 20, 1961, the United States Circuit Court of Appeals for the Seventh Circuit found that the procedural requirement of the Chicago ordinance violated the due process requirements of the Fourteenth Amendment and remanded the case to the district court. The Seventh Circuit held that the relief requested by the plaintiff should be granted, unless the City provided a hearing consistent with standards set out in its opinion.

The Seventh Circuit, however, went on to state in its opinion when and under what circumstances it would determine if a proper finding of obscenity had been reached. The court stated, at page 791:

> "If the film is found obscene or otherwise objectionable *after a proper procedural determination* by the

City authorities, plaintiff *may then* challenge before the District Court such finding of obscenity." (Emphasis supplied.)

The trial judge below, in his brief Memorandum Opinion, found that the Appellant's grounds of attack:

> "* * * collectively simply challenge the censors' basic authority and do not go to any statutory standards for procedural requirements as to the submission of the film. * * *.
>
> "* * * I have concluded that Article 66A, and in particular §2 thereof which is the basis of the charge, is valid and constitutional. Although this challenged section imposes a previous restraint, the ambit of constitutional protection does not include complete and absolute freedom to exhibit any and every kind of motion picture and this challenged provision, requiring the submission of films prior to their public exhibition, is not, on the grounds set forth by the defendant, void on its face."

The trial court concluded by quoting from Mr. Justice Clark's opinion in *Times Film Corp. v. City of Chicago*, *supra*:

> "It is not for this Court to limit the state in its selection of the remedy it deems most effective to cope with such a problem, *absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.*" (Emphasis supplied.)

In affirming Appellant's conviction, the Maryland Court of Appeals agreed with the trial judge that Appellant lacked standing to challenge any portion of the statute excepting that portion for which he was indicted and convicted. The Court stated, at Apx. 24:

> "We conclude that on the authority of the *Times Films* case, *supra*, the Maryland censorship law must

be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments. * * *"

The State of Maryland believes that the trial judge and the Maryland Court of Appeals correctly stated the law, in determining that the Maryland statute is not void on its face. The Appellant, not having submitted his film for examination, cannot make a showing of unreasonable strictures on individual liberty resulting from the statute's application in particular circumstances and he is, therefore, without standing to challenge those strictures or standards.

## CONCLUSION

The State of Maryland submits that the decision of the Court in *Times Film v. City of Chicago* is controlling in the instant case, and that the Maryland Court of Appeals correctly so found.

The Appellant presents no questions worthy of consideration by this Court, and it is respectfully requested that the decision of the Maryland Court of Appeals be affirmed, and that this appeal be dismissed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1964**

**No. 69**

RONALD L. FREEDMAN,

*Appellant,*

v.

STATE OF MARYLAND,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## BRIEF FOR APPELLANT

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APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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## BRIEF FOR APPELLANT

### Opinions Below

The opinion of Judge Anselm Sodaro of the Criminal Court of Baltimore is not reported. A copy of that opinion is at R. 75.* The opinion of the Court of Appeals of Maryland is reported at 233 Md. 498, 197 A. 2d 232. A copy of that opinion appears at R. 78.

### Jurisdiction

The final judgment of the Court of Appeals of Maryland was entered February 10, 1964 (R. 85). This Court noted probable jurisdiction on June 22nd, 1964. (R. 89). The jurisdiction of this Court rests upon 28 U.S.C. §1257(2).

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* "R" refers to Transcript of Record page numbers.

## Questions Presented

The state of Maryland has imposed criminal penalties on appellant because he publicly exhibited what the State acknowledged to be an entirely permissible motion picture without purchasing the State's prior approval of the concededly permissible motion picture through submission of the motion picture to the Maryland Motion Picture Censor Board:

1. Has not Maryland, in imposing criminal penalties on the very act of free expression of concededly legitimate matter, directly transgressed the First and Fourteenth Amendments?

2. In seeking to use its criminal processes to coerce appellant:

(A) to purchase from the State the privilege of publicly exhibiting a concededly permissible motion picture, was not Maryland seeking to impose a tax on appellant's exercise of his constitutional right of free expression in contravention of the First and Fourteenth Amendments?

(B) to submit a concededly permissible motion picture to the Motion Picture Censor Board for approval which, the State acknowledges, that Board could not have lawfully withheld, was not Maryland seeking to delay appellant in the immediate exercise of his present right of free expression in contravention of the First and Fourteenth Amendments?

## Statutory and Constitutional Provisions Involved

1. The statute, the validity of which has been drawn in question, is Article 66A of the Maryland Code,[1] Sections 2, 6, and 11 of which are as follows:

> "2. It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this Article called the Board.
>
> "6. (a) The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.
>
> "(b) For the purposes of this Article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

[1] The statute is set forth in full, Appendix A, pp. App. 1 to App. 14, infra.

"(c) For the purposes of this Article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"(d) For the purposes of this Article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

"11. For the examination of each and every one thousand feet (1,000') of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of Three Dollars ($3.00), where the film averages sixteen (16) frames or less to the foot, and a fee of One Dollar ($1.00) for the approval of every duplicate of one thousand feet (1,000') or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of Two Dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of Two Dollars ($2.00) for each one hundred (100) views or fractional part thereof,

and for the approval of duplicate views or prints thereof a fee of One Dollar ($1.00) for each one hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee of One Dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of Section 7 of this Article; and the Board shall account for and pay all fees received by it into the State Treasury."

2. The constitutional provision to which, in appellant's view, the foregoing statutory provisions are repugnant, is Section 1 of the Fourteenth Amendment of the United States.

## Statement of the Case

Appellant Ronald Freeman manages the Rex Theatre, in Baltimore (R. 14). On November 1, 1962, appellant telephoned Mrs. Eva Holland, chief reviewer of the Maryland Motion Picture Censor Board, advising her of his intention to exhibit, at the Rex Theatre in the regular course of business, a film—"Revenge at Daybreak"—which had not been submitted to the Board for censorship (R. 7). Mrs. Holland appeared at appellant's theatre that evening and saw "the film . . . exhibited in its entirety" (R. 7). And thereupon, on instruction of the Chairman of the Board, Mrs. Holland secured a warrant for appellant's arrest, which was served on appellant by a Baltimore policeman (R. 12).

Following indictment, appellant was tried in the Baltimore Criminal Court, on March 18, 1963, for the alleged violation of Section 2 of Article 66A of the Maryland Code, which makes it "unlawful to . . . exhibit . . . any motion picture film . . . in the State of Maryland unless the said film has been submitted by the . . . lessee of the film . . . and duly approved and licensed by the . . . [Motion Picture Censor] Board."

In his opening statement counsel for appellant advised Judge Sodaro that "the State purports to have the right under this act [Article 66A] to restrain the right of Mr. Freedman to exercise his constitutional freedoms of speech and press. It is the belief of Mr. Freedman and myself that the Censorship Act is an oppressive act that is unconstitutional under both the Federal and State Constitutions . . ." (R. 4-5).

The State proved, through Mrs. Holland, that appellant had exhibited "Revenge at Daybreak" without submitting it for censorship (R. 7-8). Appellant was not permitted to examine Mrs. Holland on whether the film satisfied the statutory censorship standards, but appellant offered to prove that, had she been permitted to answer, Mrs. Holland would have acknowledged "that the film did not violate any of the standards set forth in this act" (R. 11). Mrs. Holland and her subordinate, Mr. Vaughn, "look at each and every movie . . . that comes in the State of Maryland, with the exception of newsreels . . ." (R. 40). Only if Mrs. Holland and Mr. Vaughn are doubtful about a film is the Board of Censors convened to review it.

Appellant, by calling members of the Motion Picture Censor Board, showed the way in which the Board administers the statutory censorship standards.[2]

Appellant testified that in submitting an average film for censorship, one has to pay a fee of, on the average, some $30 (R. 16). Appellant also showed, through the Board's annual reports, that over the course of the Board's more than 40 years of existence the fees it has collected have exceeded administrative costs by over a half a million dollars, which excess has gone to the Maryland Treasury (R. 62).

The prosecutor advised Judge Sodaro that Maryland did not contend that "Revenge at Daybreak" was obscene or that the Motion Picture Censor Board would not have approved the film had it been submitted (R. 19). At appellant's request, Judge Sodaro himself viewed the film (R. 20), and the film is part of the record in this case (R. 6).

At the close of all the testimony, appellant moved

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[2] For example, appellant's counsel examined Norman Mason, a member of the Board, on the way in which the Board has administered Section 6 (c), which is almost verbatim the same as the section of the New York statute involved in *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, in which the New York ban on the film of "Lady Chatterley's Lover" was set aside (R 32-33):

> Q. You know it involved the same standard, Mr. Mason, having knowledge of the fact that these standards have been knocked out by the United States Supreme Court, have you still continued to employ the use of these same standards in the censoring of films? A. Sir——
>
> (Fol. 55) (Mr. Freeze) Objection.
>
> (The Court) Well, let him answer. Let him answer.
>
> (Witness) Sir, each picture is altogether different. It depends upon the circumstances why certain scenes would be allowed in a picture; and, maybe other circumstances

for a judgment of acquittal (R. 53-54), on the grounds *inter alia*, that Article 66A of the Maryland Code

> . . . violates the First and Fourteenth Amendments of the United States Constitution in that said Article imposes an invalid infringement upon the exercise of the right of free speech and press . . .
>
> . . . is invalid as contrary to the Due Process Clause of the Fourteenth Amendment in that the standards pursuant to which speech is abridged set forth in, more specifically, Section 6 of said Article, are vague and in that these standards fail to advise defendant of those forms of speech which the state purportedly proscribes . . .
>
> . . . is so vague and indefinite in form that it can be interpreted as to permit within the scope of its language the banning of incidents fairly

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possibly it would not be. I mean, each picture has to go on its own. I mean, in other words, you can't very well take one picture and it has been a guide only to a certain degree.

(Question read.)

Q. (Mr. Bilgrey) Is your answer yes? A. No, it isn't yes. Each picture has to stand on its own merits, I mean, rarely do you see two pictures, in fact. I have never seen two pictures identically alike; and, certain parts of a picture tends to make it altogether different than other parts in the picture.

Q. I would still like to get an answer yes or no.

(The Court) Well, the answer to the question is, Mr. (Fol. 56) Mason, as I understand it, knowing these standards have been knocked out by the Supreme Court, do you still use those same standards?

(Witness) No.

(The Court) The answer is no.

Q. (Mr. Bilgrey) What standards do you use if you do not use the standards that are contained in Section 6? What

> within the protection or guarantee of freedom of speech and press and is therefore void as contrary to the Fourteenth Amendment of the United States Constitution and as contrary to the terms of the Maryland Constitution . . .
>
> . . . is invalid in that it imposes a tax and/or a license fee upon the right of the freedoms of speech and press and is thus contrary to the First and Fourteenth Amendments of the United States Constitution. . . .

On May 24, 1963, Judge Sodaro filed a memorandum opinion (R. 75-77) overruling appellant's federal claims and denying his motion for acquittal. Thereupon Judge Sodaro entered a judgment of conviction and fined appellant $25 (R. 2).

Appellant, repeating his federal claims, appealed the judgment of conviction to the Maryland Court of Appeals. On February 10, 1964, the Court of Appeals affirmed the judgment of conviction. 233 Md. 498, 197 Atl. 2d 232. Although expressly noting that the State conceded that "Revenge at Daybreak"

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> standards do you use, that is what we are trying to find out. A. With each picture depends solely on itself. No way to make a general answer of that particular question.
>
> Q. You use different standards, then, in connection with your judging of every individual film? A. Any portion of any picture that the Supreme Court has ruled on we try to go by the Supreme Court ruling. I mean, we don't try to overpower those boys, is that what you mean?

Another member of the Board, Mrs. Louis E. Sheeter, testified (R. 46):

> A. I know the ruling that we were familiarized with in our office on Lady Chatterly's [sic] Lover.
>
> A. If the acts of immoral behavior were glamorized or glorified it was still within our rights not to permit them (fol. 83) to pass.

would have been approved had it been submitted for censorship, the Court of Appeals concluded—as had Judge Sodaro below—that the decision in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, ruled the case adversely to appellant's federal claims.

On June 22, 1964, this Court noted probable jurisdiction. 84 S. Ct. 1919.

## Summary of Argument

I. Contrary to the view taken by both the courts below, and also by the State in its Motion to Dismiss or Affirm the instant appeal, this case is not controlled by *Times Film Corp.* v. *Chicago,* 365 U.S. 43. In *Times Film,* petitioner, wishing to exhibit the film "Don Juan" without submitting it to the municipal censorship board, brought a federal court action to enjoin the required submission. This Court pointed out that "there is not a word in the record as to the nature and content of 'Don Juan'," but that petitioner felt "that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination." 365 U.S. at 46. In that setting this Court said that the "broad justiciable issue" posed by the case was "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." *Ibid.* The present case, on the other hand, is a criminal prosecution for exhibiting a film—"Revenge at Daybreak"—which, as was noted by the Maryland Court of Appeals, "the

State conceded . . . would have been approved had it been submitted for licensing" (R. 80).

II. Motion pictures are a medium of expression protected by the First and Fourteenth Amendment from governmental interference. *Burstyn* v. *Wilson*, 343 U.S. 495. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. An administrative system for censoring motion pictures prior to their exhibition "admittedly . . . imposes a previous restraint . . .". *Times Film Corp.* v. *Chicago, supra*, at 46. Assuming, *arguendo* the continued vitality of the holding in *Times Film* that, because of the special nature of the medium, prior restraints may be permissible with respect to motion pictures which are outside the scope of constitutional protection, the holding carries with it an obvious corollary: The state can neither restrain nor punish the exhibition of a constitutionally protected motion picture. *A Quantity of Books* v. *Kansas*, 84 S. Ct. 1723, 1727 (concurring opinion of Stewart, J.) *cf. Jacobellis* v. *Ohio*, 84 S. Ct. 1676, 1683 (concurring opinion of Stewart, J.). "Revenge at Daybreak", the film shown by appellant, concededly falls within the category of protected motion pictures.

Although the censor's power to restrain the exhibition of all or part of a film is plainly circumscribed by the "dim and uncertain line" beyond which lies the constitutionally protected domain (*Bantam Books* v. *Sullivan*, 372 U.S. 58, 66), it may be thought to be arguable that the state's asserted power to make crim-

inal the public screening of a film which has not been submitted for censorship, embraces (when used as an appropriate adjunct to a valid censorship system) not only unprotected films but films whose constitutional status is initially unknown. If the state is to be deemed entitled to fashion such a crime, the defendant unquestionably must be permitted to show, by way of defense, the constitutionally protected character of the motion picture he is charged with having exhibited. See Point V, *infra*. In any event, however, the suggested rationale underlying such a criminal prosecution can avail the State of Maryland nothing in the present instance; for here the state has not only not sought to show the impropriety of "Revenge at Daybreak", it has conceded that the film is an entirely proper one. Maryland's position is, therefore, cognate with that of the United States in *Ex parte Endo*, 323 U.S. 283, 302: "The authority to detain a citizen . . . as protection against espionage or sabotage is exhausted at least when his loyalty is conceded." Since the prosecution of appellant "is not reasonably related to any proper governmental objective" (*Bolling* v. *Sharpe*, 347 U.S. 497), his conviction must be reversed.

III. Making it a crime to show an unlicensed film is intended to funnel all films into the hands of the Maryland Board of Motion Picture Censors. But, at least as applied to concededly permissible films, requiring their submission to the Board of Censors serves no valid governmental purpose. On the contrary, it serves two invalid purposes: One is to tax the exercise of the right of free expression. The other is to delay—perhaps for an extended time—the exer-

cise of the right. The magnitude of these interferences with every film submitted is only underscored by the fact that the Board of Censors, in a typical recent year, found 99.5% of all films submitted to be wholly unobjectionable. The Constitution does not authorize the imposition of infringements so numerous and pervasive as these in order to accomplish ends which are so disproportionately minute. *Shelton* v. *Tucker,* 364 U.S. 479, 488. Moreover, since the actual need for any system of prior restraint of films seems so flimsy, to impose this burden on films and not on other media of expression appears to work a denial of the equal protection of the laws.

IV. Even if Maryland could constitutionally require appellant to submit "Revenge at Daybreak" to a proper censorship system, this system is not a proper one: (1) the substantive standards are virtually identical with those invalidated in *Kingsley International Pictures* v. *Regents,* 360 U.S. 684; and (2) the judicial procedures lack the speed and safeguards of those sustained in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436. Appellant is entitled to challenge these standards and procedures. *Staub* v. *Baxley,* 355 U.S. 313; *Thornhill* v. *Alabama,* 310 U.S. 88.

V. In defending against a criminal prosecution for showing an unsubmitted film, appellant was constitutionally entitled to demonstrate, by way of complete defense, the conceded fact that "Revenge at Daybreak" falls within the ambit of the First Amendment's protection. This is implicit in the views of Professor Freund (4 *Vand. L. Rev.* 533, 539) and Pro-

fessor Bickel (*The Least Dangerous Branch*, pp. 137-38), explicit in the *Times Film* dissent (365 U.S. at 48), and follows necessarily from *Staub* v. *Baxley*, *supra*; *Thornhill* v. *Alabama*, *supra*; and *Gelling* v. *Texas*, 343 U.S. 960.

## ARGUMENT

### I

**The Maryland Court of Appeals, like the Baltimore Criminal Court, erred in concluding that the instant case is controlled by *Times Film Corp.* v. *Chicago*, 365 U.S. 43.**

The Maryland Court of Appeals agreed with the Criminal Court of Baltimore that appellant's federal claims were governed, adversely to appellant, by this Court's decision in *Times Film Corp.* v. *Chicago*, 365 U.S. 43. The State of Maryland has adhered to this view in its "Motion to Dismiss or Affirm" the instant appeal. Appellant submits that in sustaining his conviction "on the authority of the *Times Film* case," (R. 83, 197 A. 2d, at 235), the Court of Appeals failed to recognize that *Times Film* and the instant prosecution are vastly different—constitutionally different—cases.

*Times Film* was a civil action in equity initiated by a motion picture distributor seeking to challenge Chicago's system of municipal censorship of motion pictures. Plaintiff had tendered to the censorship officials the required license fee, but had declined to submit for censorship the film ("Don Juan") which plaintiff sought to exhibit. When the censorship of-

ficials refused to issue a permit authorizing plaintiff to exhibit the film, plaintiff sought a federal court order compelling issuance of the permit, or, in the alternative, enjoining enforcement of so much of the municipal code as prohibited exhibition of a film without permission of the censoring officials. Plaintiff's position was that it was entitled to exhibit the film in question, whatever its content, subject only to subsequent criminal prosecution under Illinois' laws against pornography. The federal district court and the federal court of appeals concluded that the case posed no justiciable issue. This Court, on certiorari, found that there was a justiciable issue, and addressed itself to the merits. And this Court carefully delineated the issue before it (365 U.S. at 46):

> Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone we decide.

Having so delineated the issue, this Court resolved it adversely to plaintiff (365 U.S. 46, 47):

> . . . [T]here is not a word in the record as to the nature and content of "Don Juan." We are left entirely in the dark in this regard, as were the city officials and the other reviewing courts. Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. . . .

> Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill. Rev. Stat. (1959), c. 38, §470, and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment. . . . Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of such an evil, previous restraint cannot be justified. With this we cannot agree.

The instant case comes before this Court in an entirely different posture, and presents issues of very different dimension. In the instant case, the moving party is the state, which seeks to sustain a criminal judgment against appellant. In the instant case, appellant does not claim—as petitioner claimed in *Times Film*—"complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" 365 U.S. at 46.[3] In the instant case it cannot be said, as this Court properly said in *Times Film*, that "there is

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[3] That this Court's statement of the issue in *Times Film* accurately reflects the position asserted by petitioner before this Court is evident from the following colloquies which took place on the oral argument in *Times Film*:

> Justice Harlan: What you are saying, I gather, is that on the assumption this film which we haven't got is the hardest sort of hard core pornography, that the State of Illinois cannot deal with you through a licensing program, but that it has got to let you exhibit and then prosecute you if you violate the criminal law; is that it?

not a word in the record as to the nature and content" of the film sought to be exhibited, or that the members of this Court "are left entirely in the dark in this regard, as were the city officials and other reviewing courts." 365 U.S. at 46, 47. In the instant case, the film in question—"Revenge at Daybreak"—has been publicly exhibited (R. 5, 17); is in the record (R. 6); has been viewed by the trial court (R. 20); and is available for viewing by this Court. Moreover, the film was viewed by the Censor Board's chief reviewer, Mrs. Holland, at the time of its public exhibition. At appellant's trial, Mrs. Holland apparently would have testified, had she been permitted to do so, that "Re-

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Mr. Bilgrey: Mr. Justice Harlan, if I may be permitted to expand on that, we are saying that to a certain degree that we are not suggesting what remedies the state can have.

Justice Harlan: Isn't that your whole case? Isn't that what you are here about?

Mr. Bilgrey: Well, I believe that that is a correct statement, Mr. Justice Harlan. . . . (Transcript of oral argument, pp. 11-12.)

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Justice Frankfurter: I am not suggesting any presumption regarding this particular undisclosed film. What I am suggesting is a legal proposition, if I follow your argument at all, that for purposes of the question before the Court, it is a matter of indifference what the character or quality or message or whatever you may say about a film, it is a matter of indifference.

It may be at once the most notable and noble picture, or it may be the vilest of pictures. From the point of view of the question before the Court, that is a matter of indifference.

Mr. Bilgrey: I think it is. I think that is correctly stated, Mr. Justice Frankfurter.

Justice Frankfurter: Very well. (Transcript of oral argument, p. 25)

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Justice Whittaker: I am asking you—I am not hypothetical: I am on concrete cases here.

I am asking you if by this very suit you are not asking

venge at Daybreak" violated none of the standards of the Maryland law (R. 11); and the prosecutor acknowledged that Maryland did not contend that the film was obscene or that it would not have been approved by the Board if submitted for licensing. Indeed, on appeal, as the Court of Appeals itself observed, the State of Maryland acknowledged that the film in question "*would have been approved had it been submitted for licensing.*" (R. 80), 233 Md. at 502, 197 A.2d at 234 (emphasis added.)

In short, in the instant case the State of Maryland has visited criminal punishment on one whose sole act has been to exhibit a film which, *as the state concedes,* the state was without legal power to proscribe. Thus the very issue tendered and decided in *Times Film*—"whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" (365 U.S. at 46)[4]—is absent here. Here the State of

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the City to issue a license to show the film, whether or not it is obscene.

Mr. Mikva: Whether or not it is obscene because there is no reason to assume that it is obscene.

Justice Whittaker: Well, is there a reason to assume that it is not?

Mr. Mikva: No; and, therefore, it is the same thing as a printing press or any other form of communication. You make no assumption about it. . . . (Transcript of oral argument, p. 86)

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See also pp. 5, 6 and 8 of the transcript of oral argument.

[4] Subject only to "the invocation of criminal process under the . . . pornography statute . . . and then only after a transgression." 365 U.S. at 49. This Court has since reiterated the limited nature of the *Times Film* decision: "The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances.*" *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 n. 10. (emphasis by this Court).

Maryland seeks to punish appellant for exhibiting a motion picture which the state has conceded to be unobjectionable.

*Times Film*—the authority relied on as controlling by the two courts below—plainly does not support appellant's conviction. Maryland, in its "Motion to Dismiss or Affirm", has elected to stand on the same untenable ground, and no other. Therefore, appellant's conviction should be set aside.

## II

**Because "Revenge at Daybreak" is concededly a constitutionally protected film, appellant's conviction for publicly exhibiting that film cannot be sustained.**

It is no longer open to dispute that motion pictures, like speech and the press, are a medium of expression protected by the First and Fourteenth Amendments. *Burstyn* v. *Wilson,* 343 U.S. 495; *Smith* v. *California,* 361 U.S. 147. But as with the spoken and written word, so too with films, there is a very minute sector of constitutionally unprotected expression—*e.g.,* obscenity, and direct incitement to immediate rebellion or other grave crime. Within that very minute sector, expression may be punished (*Feiner* v. *New York,* 340 U.S. 315; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568), and apparently may even, under extraordinary circumstances, be subject to forms of prior restraint. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436. It is evident, however, that only the most rigorously structured and administered systems of prior restraint can pass constitutional muster. "Any system of prior

restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. This Court in *Times Film* of course recognized that a governmental mechanism under which motion pictures are licensed prior to public exhibition "imposes a previous restraint." 365 U.S. at 46. But, in view of what a majority of this Court held to be the special nature of the motion picture medium, injunctive relief preventing enforcement of the licensing system with respect to "any . . . kind of motion picture" whatever its "nature and content" was denied. As this Court recently put it in *Bantam Books, supra*, at 70 n. 10, the decision in *Times Film* was confined to the question "whether a prior restraint was necessarily unconstitutional *under all circumstances*" (emphasis by this Court).

*Times Film* did not, of course, sustain the validity of a system of administrative licensing of motion pictures as applied in any particular context. Appellant, with all deference, questions the soundness of *Times Film* to the extent that it is subject to the construction that a system of licensing constitutionally protected films in advance of their exhibition can be validly enforced. Nevertheless, assuming, *arguendo*, the continued vitality of *Times Film*, appellant submits that what *Times Film* means—and all it could conceivably mean, compatibly with the First and Fourteenth Amendments—is that a system of prior censorship, containing appropriate procedural safeguards, may be permissible with respect to films which are demonstrably outside the scope of constitutional protection. So understood, the holding carries with it

a necessary corollary: government cannot restrain, just as it cannot punish, the exhibition of constitutionally protected films.[5] The essential and manifest point was recently made by Mr. Justice Stewart, concurring in *A Quantity of Books* v. *Kansas,* 84 S. Ct. 1723, 1727: having concluded that "the books . . . involved were not hard-core pornography," Mr. Justice Stewart added, "Therefore, I think Kansas could not by any procedure constitutionally suppress them, any more than Kansas could constitutionally make their sale or distribution a criminal act." Cf. *Jacobellis* v. *Ohio,* 84 S. Ct. 1676, 1683 (concurring opinion of Stewart, J.)

As applied to appellant's case, the thrust of these observations seems plain. Since "Revenge at Daybreak" is, by the state's own concession, neither obscene nor in any other sense outside the realm of constitutional protection, Maryland "could not by any procedure constitutionally suppress" the film, nor could Maryland "constitutionally make" exhibition of the film "a criminal act." Wherefore, appellant's conviction cannot stand.

Nor does Maryland's case draw strength from an attempt to define the offense charged in a different way—as by arguing that appellant's crime lay in exhibiting "Revenge at Daybreak" without submitting the film to the Maryland Motion Picture Censor Board for that Board's prior approval of the proposed showing. For here, to repeat, appellant's film

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[5] "But our holding in *Roth* [*Roth* v. *United States,* 354 U.S. 476] does not recognize any state power to restrict the dissemination of books which are not obscene" *Smith* v. *California,* 361 U.S. 147, 152.

is conceded to be one which the Board could not have lawfully denied appellant the right to exhibit. And so the state is, presumably, remitted to contending that it was entitled to require the footless act of prior submission—with its attendant costs to appellant in fees, and in delay (see *infra,* Point III)—merely as a way of assuring that other films, the content of which is unknown, would continue to be funneled through the Motion Picture Censor Board in the manner contemplated by Article 66A, §2, of the Maryland Code.

If Maryland could persuasively argue that creation of the crime of non-submission is an appropriate adjunct to a valid system of censorship, it would still be constitutionally necessary to permit appellant to show, as matter of defense, the constitutionally protected nature of the film he exhibited. See *infra,* Point V.

At all events, once it is granted that appellant's film was constitutionally protected, there is no further basis for the argument that penalizing appellant for exhibiting a non-submitted film legitimately reenforces a valid censorship system. The argument fails, as a comparable argument failed, in the face of claims of personal liberty on a par with the rights protected by the first Amendment, in *Ex Parte Endo,* 323 U.S. 283. There, it will be recalled, the United States sought to resist the release from a World War II relocation center of an American citizen of Japanese ancestry whose loyalty the government conceded. Miss Endo could not be released, in the government's view, until a program for her planned relo-

cation in an approved area of the country had been arrived at: "The success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation. . . ." 323 U.S., at 297. But this Court held that Miss Endo was entitled to immediate release (323 U.S., at 302):

> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.
>
> Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espion-

age or sabotage is exhausted at least when his loyalty is conceded.

In the instant case, even if we assume (as appellant does, for purposes of argument, though he would also challenge the assumption) that the claimed authority to exclude certain films in advance is justified, this authority, *and the claimed cognate authority to punish for exhibiting an unlicensed film,* are exhausted when the legitimacy of the film sought to be exhibited is conceded. At that point, both the authority to restrain and the authority to punish are no longer "reasonably related to any proper governmental objective." *Bolling* v. *Sharpe,* 347 U.S. 497, 500. To hold otherwise—to permit appellant's conviction to stand—would be to accord appellant the curious honor of being the first American in the nation's history who was branded a criminal for exercising rights conceded to be indubitably his under the First Amendment.

## III

**To force appellant to submit his concededly permissible film for censorship, as the price of avoiding criminal prosecution, would be to force appellant to expend both money and time to purchase a privilege of expression which, under the Constitution, belongs to appellant as a matter of free right.**

The constitutional right at issue in the instant case is the right of free speech. When exercise of the right is contingent on payment of a fee, and then only at some future date, what was once a right has

degenerated into a privilege. And the speech is no longer free.

**(1) The cost to appellant in dollars:**

If appellant had submitted "Revenge at Daybreak", the film he proposed to exhibit, to the Motion Picture Censor Board, he presumably would have received a license to show the film and would thereby have insulated himself against the present criminal prosecution. But to qualify himself to receive the benison of a license appellant would have had to pay a fee of approximately thirty dollars (R. 16). Moreover, even after getting the Board's official seal of approval for his film, appellant would have had to pay a further fee if he had wished at a future date to exhibit a duplicate print of the same film. Art. 66A, Sec. 11, *supra,* pp. 4, 5 of Brief.

Assuming the continued vitality of *Times Film,* it may be arguable that Maryland can exact a license fee approximately commensurate with the administrative cost of maintaining a valid system of prior censorship. But this means, of course, that the state is powerless to exact a money fee for a permit to exhibit a film which is known to be uncensorable—*i.e.,* a film with respect to which it is known *in limine* that the Censor Board can have no role to play.

Thus, to hypothesize a concrete example, if on July 1, 1964, appellant had proposed to exhibit "The Lovers" at the Rex Theatre in Baltimore, and if nobody had sought to exhibit that film in Maryland prior to that date, it cannot be seriously urged that the Censor Board would be entitled to charge appellant

a fee for granting him permission to exhibit a film determined by this Court, on June 22, 1964, in *Jacobellis* v. *Ohio,* 84 S. Ct. 1676, to be constitutionally protected.[6] (In actual fact, appellant, presumably on payment of the prescribed fee, sought a permit to exhibit "The Lovers" in Maryland some years back; the film was rejected by the Censor Board; after the "burdensome and onerous process" of appeal to the Maryland courts—a process which "takes a great deal of time, a great deal of money"—appellant succeeded in getting the decision of the Censor Board set aside. (R. 15).

By the same token, there is simply no warrant in the Constitution for the Censor Board's actual practice, required by the governing statute, of charging a fee for a permit to show the duplicate of an already approved film. Here—as in the hypothesized example of "The Lovers"—the fee obliterates with a dollar sign the free exercise of unquestioned First Amendment rights. It thus flatly contradicts this Court's unbroken line of cases striking down taxes imposed on the exercise of rights of speech and the press. *Grosjean* v. *American Press Co.,* 297 U.S. 233; *Jones* v. *Opelika,* 319 U.S. 103; *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Follett* v. *McCormick,* 321 U.S. 573.

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[6] Cf. *American Civil Liberties Union* v. *Chicago,* 3 Ill. 2d 334, 121 N.E. 2d 585, appeal denied 348 U.S. 979, involving denial of a license to the motion picture "The Miracle" on grounds of claimed obscenity, *subsequent to* this Court's reversal in *Burstyn, supra* of the New York ban on "The Miracle" as "sacrilegious". "Vindication by the courts of *The Miracle* was not had until five years after the Chicago censors refused to license it. And then the picture was never shown in Chicago", *Times Film, supra,* dissenting opinion of Mr. Chief Justice Warren, at 31.

Precisely the same considerations govern appellant's supposed obligation to submit "Revenge at Daybreak" for licensing and to pay the demanded fee as a predicate to receiving the license. To the extent that *Times Film* can be regarded as giving doctrinal underpinning to a procedure akin to that employed by Maryland, the case is relevant only with respect to films as to which the censoring "officials and the . . . reviewing courts" are "entirely in the dark." 365 U.S. at 46-7. But in the present case appellant wished to exhibit a film conceded by Maryland to be unobjectionable. Moreover, Maryland has known the film to be unobjectionable at least since it was exhibited by appellant on the occasion which gave rise to this litigation. For on that occasion the film was viewed by Mrs. Holland, chief reviewer (and one-time member) of the Board, (R. 7-8), who views all submitted films and who convenes the Board to view only those films she questions (R. 40). And Mrs. Holland, had she been permitted to answer defense counsel's questions, apparently would have testified at trial that the film violated none of the Maryland statute's standards (R. 11). If, therefore, on the day following appellant's exhibition of the film at the Rex Theatre, appellant had sought a license to authorize further showings, the Censor Board would have been no more entitled to exact a fee for processing "Revenge at Daybreak", which Mrs. Holland had already viewed with approval, than, in the hypothesized instance, the Censor Board would be entitled to exact a fee for a current license for "The Lovers".

It may be argued, however, that the real question is whether appellant could have been constitutionally required to pay a fee as the price of a permit if he

had sought the Censor Board's leave to show "Revenge at Daybreak" the day before he exhibited and Mrs. Holland saw the film. At that point (so the argument would presumably run) Maryland had no information about the film and could, therefore, have properly imposed on appellant all the burdens incident to establishing the film's purity. But the surface plausibility of the argument barely conceals the essential anachronism which inheres in systems of administrative licensing of motion pictures that put the initial and costly burden of proof entirely on the would-be exhibitor: As Alexander M. Bickel has put the matter (*Bickel, The Least Dangerous Branch*, p. 137):

> The state cannot ordinarily arrest an individual or search his papers or effects without first making out probable cause that he has committed an illegal act, and it ought to have no greater power over the product of an individual's mind, which a motion picture may sometimes turn out to be. It is strange and unaccustomed that the exhibitor of a motion picture should have the burden of coming forward with evidence of "innocence" while the censor need prove nothing at this stage.

Of course the oft-asserted excuse for this extraordinary procedural turnabout—and for the attendant constraints thus placed on the free and immediate exercise of fundamental constitutional rights—is the special character of the motion picture medium. Presumably this excuse should be supportable by data tending to demonstrate that, with alarming frequency, films submitted for censorship are in fact censorable. But the data of Maryland's own Censor Board shows

just the opposite to be true. For example, according to the Board's forty-fifth annual report, in "the fiscal year ending June 30, 1961 . . . the Board examined and processed a total of 7,074 subjects . . . Of these 7,074 subjects, 7,045 were approved without modification and 27 were modified in part, and two films were rejected in their entirety (R. 66). Thus, better than 99.5% of the films examined were approved without incident[7]—except that charges in excess of $66,000 were imposed on the motion picture industry, thereby enabling the Maryland Board to continue to turn the modest annual profit which has netted the state over half a million dollars in forty-five years of censorship (R. 66). So gross an imposition for so microcosmic an end is surely impermissible: "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488.

The experience of the Maryland Censor Board not only establishes that Maryland's intrusion on the First Amendment rights of motion picture exhibitors is indefensibly disproportionate to any supposed community need for a system of prior restraint of motion pictures. It also shows that the alleged special character of the motion picture medium, which is said to support a system of prior restraints for that medium which this Court has not sanctioned as to other media

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[7] This is, of course, not to be understood as meaning that the Censor Board is invariably right in its adverse judgment of the tiny fraction it modifies or rejects. Appellant's experience with "The Lovers" belies this. And see the other Maryland cases cited *infra*, p. 32.

of expression (*Times Film, supra; Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58, 70 n. 10), does not have as its corollary any such distinctive hazard as would tend to justify the special burden cast upon the motion picture medium. In short, singling out motion pictures as the single permissible target of a system of prior restraint poses a major problem of denial of the equal protection of the laws. As to motion pictures exhibited via the air waves, see *Allen B. Dumont Labs.* v. *Carroll,* 184 F. 2d 153 (C.A. 3, 1950) cert. den. 340 U.S. 929.

Viewed in this context, it is evident that what Maryland sought to do in the instant case—through the *in terrorem* impact of its criminal process, waiting in the wings—was to coerce appellant into payment of a fee to subsidize a state administrative procedure which was at least as to appellant, constitutionally unjustifiable.

The thirty dollars which would have been exacted of appellant, had he submitted his film, would have been an inspection fee taken from him at the toll gate before he could travel the highway beyond. But, in appellant's case, it is conceded that appellant's vehicle—"Revenge at Daybreak"—was, constitutionally speaking, without blemish. Wherefore, appellant was constitutionally entitled to travel the highway without charge.

Needless to add, this conclusion is not altered by the fact that a payment of only thirty dollars (together with submission of the film) would have saved appellant the criminal penalties now sought to be visited upon him. In *Follett* v. *McCormick, supra,* the daily license cost but a dollar; and an entire year's

license could have been had for fifteen dollars. Indeed, as Madison insisted in his memorable Remonstrance against money exactions to support religion, "it is proper to take alarm at the first experiment on our liberties. . . . The same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever." See *Everson* v. *Board of Education,* 330 U.S. 1, 33, n. 29 (dissenting opinion). The First Amendment knows no rule of *de minimis.*[8]

**(2) The cost to appellant in time:**

Rights of free expression, like rights to the equal protection of the laws, are "personal and present." *McLaurin* v. *Oklahoma,* 339 U.S. 639. To delay rights of free expression, as to delay the claims of justice, is to deny them. Cf. *Staub* v. *Baxley,* 355 U.S. 313; *Niemotko* v. *Maryland,* 340 U.S. 268; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Schneider* v. *State,* 308 U.S. 147; *Lovell* v. *Griffin,* 303 U.S. 444.

Had appellant submitted "Revenge at Daybreak," a concededly permissible motion picture, to the Motion Picture Censor Board, that Board would, under Rule 4 of its Rules, have consumed between two and three days in reaching the fore-ordained conclusion that appellant was constitutionally entitled to exhibit the motion picture to the public (R. 57).

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[8] Were it otherwise, it could be argued that the fact that, in the instant case, appellant was only fined twenty-five dollars would deprive him of standing to appeal to this Court. But see *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Thompson* v. *Louisville,* 362 U. S. 199.

Two-to-three days of delay in exhibiting a motion picture may be a tolerable burden where it served some arguable valid state purpose—where, for example, two or three days must be consumed in pursuing censorship procedures whose validity is supported by this Court's holding in *Times Film*. But where, as here, it is manifest that with respect to a particular motion picture no review procedure is needed, or can constitutionally be imposed, then any significant delay—like any monetary exaction—becomes an unconstitutional obstacle to the exercise of First Amendment rights.

The more so is this true when it is recognized that the two-to-three days required by the Motion Picture Censor Board presumes that the Board will recognize the innocence of each unobjectionable film it processes. The actual fact is to the contrary. Because the Motion Picture Censor Board is a board of censorship, it tends to censor.[9] And it tends to censor films which are, in the perspective of the law, beyond its reach. But before the law catches up with the Board—as the Maryland Court of Appeals did, for example, in *State Board of Motion Picture Censors* v. *Times Film*, 212 Md. 454, 129 A.2d 833; *United Artists* v. *Maryland State Board of Censors*, 210 Md. 586, 124 A.2d 292; and *Fanfare Films, Inc.* v. *Motion Picture Censor Board*, 234 Md. 10, 197 A.2d 839. — not days but years go by in which an exhibitor's constitutional rights have been irretrievably lost.

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[9] Section 3 of the statute provides that the Censor Board shall be composed of three Maryland citizens "well qualified by education and experience to act as censors. . . ." (App. A, p. App. 2, *infra*).

In this case Maryland sought to use its criminal process as a device to compel appellant to undergo the concededly useless process of censorship—a process which could subserve only the ends of augmenting state revenues[10] and delaying appellant in the free exercise of his constitutional rights. Maryland sought, through the threat of criminal prosecution, to compel appellant to submit his film to censorship. Appellant would not submit, and therefore he was prosecuted. His conviction cannot coexist with the First and Fourteenth Amendments.

## IV

**Assuming appellant could have been required to submit his film to a valid censorship system, the standards and appellate procedures contained in the Maryland system are constitutionally defective.**

In *Times Film* this Court noted that the particular standards contained in the Chicago censorship ordinance "are not challenged and are not before us." 365 U. S. at 46. In the instant case, appellant at trial and since has challenged the entire structure of Maryland's censorship system. And this—notwithstanding the contrary view of the court below—appellant is fully entitled to do: "One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." *Thornhill* v. *Alabama,* 310 U. S. 88, 98. As Mr. Justice Whittaker put the mat-

[10] Had appellant's film been held objectionable by the Board, he would also have had to incur substantial added costs in appellate litigation—as, of course, he has had to on appeal from the instant conviction.

ter, speaking for the Court, "The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." *Staub* v. *Baxley*, 355 U. S. 313, 319. *Accord*: *Thomas* v. *Collins*, 323 U. S. 516.

The invalidity of the statutory standards sought to be administered by the Maryland Censor Board goes to the heart of the Maryland censorship system:

Section 6(a) of the Maryland statute requires the Board to:

> Approve and license such films or views which are moral and proper; and . . . disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes.

Section 6(c) recites that:

> For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

On the face of the statutory language, it is hard to conceive of a way in which these standards could be so rigorously administered as to confine the Censor Board to the "hard-core pornography" which is all that Maryland "could . . . by any procedure constitu-

tionally suppress . . . ." *A Quantity of Books* v. *Kansas,* 84 S. Ct. 1723, 1727 (concurring opinion of Stewart, J.) and to which "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited . . ." *Jacobellis v. Ohio,* 84 S. Ct. 1676, 1683 (concurring opinion of Stewart, J.).

However, we are not remitted to conjecture as to the invalidity of Maryland's statutory standards. For in *Kingsley International Pictures* v. *Regents,* 361 U. S. 684, this Court considered and found constitutionally defective New York's ban on "Lady Chatterley's Lover"—a ban which was predicated on virtually identical statutory language:

> . . . the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.[11]

The crucial substantive invalidity of the Maryland censorship system is matched by the system's procedural defectiveness. On this score the central problem is that the informal—almost casual—non-adversary administrative mechanism is coupled with (1) provisions for judicial review which are woefully—

[11] The state seems to have conceded below that a portion of the statute is unconstitutional, Brief of Appellee in the Court of Appeals of Maryland, at 21-22.

unconstitutionally—time-consuming, and (2) the coercive criminal sanctions for non-submission on which appellant has been impaled in the instant case. The defective Maryland procedures precisely emulate the Chicago procedures succinctly dissected by Mr. Chief Justice Warren in his dissent in *Times Film*. The *Times Film* majority, not finding the specifics of the Chicago ordinance at issue, had no occasion to consider the Chicago procedures. But the dissenters, speaking through Mr. Chief Justice Warren, canvassed the Chicago procedures with care, comparing them unfavorably to those endorsed by the Court in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436. The following words of the Chief Justice are directly transposable to the Maryland statute (*Times Film, supra*, 365 U. S. at 65, 66).

> The statute in *Kingsley* specified that the person sought to be enjoined was to be entitled to a trial of the issues within one day after joinder and a decision was to be rendered by the Court within two days of the conclusion of the trial. The Chicago plan makes no provision for prompt judicial determination. In *Kingsley*, the person enjoined had available the defense that the written or printed matter was not obscene if an attempt was made to punish him for disobedience of the injunction. The Chicago ordinance admits no defense in a prosecution for failure to procure a license other than that the motion picture was submitted to the censor and a license was obtained.

## V

**Appellant was constitutionally entitled to show, by way of defense to the instant criminal prosecution, that "Revenge at Daybreak" was a constitutionally protected film.**

The Maryland Court of Appeals noted the state's concession that "Revenge at Daybreak" would have been licensed if submitted for censorship. The Court of Appeals noted that concession "Parenthetically." That concession—which meant that the film exhibited by appellant was constitutionally protected—should have called for reversal of appellant's conviction forthwith.

In *Kingsley Books* v. *Brown,* 354 U.S. 436, this Court, speaking through Mr. Justice Frankfurter, rejected the claim that New York's statutory scheme for enjoining the sale and distribution of obscene books was necessarily unconstitutional simply because it was, manifestly, a system of "prior restraint." Mr. Justice Frankfurter turned to a then recent article by Paul Freund as authority for the proposition that mere invocation of the term "prior restraint" is not an automatic solvent of constitutional problems. The Justice quoted Professor Freund's observation that, "What is needed is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." Freund, *The Supreme*

*Court and Civil Liberties*, 4 *Vand. L. Rev.* 533, 539 (1951).[12]

Just before the sentences quoted by Mr. Justice Frankfurter, Professor Freund had ventured a "particularistic analysis" which bears with compelling impact on the issues posed by the instant case. Professor Freund put the matter this way (Freund, *supra*, 4 Vand. L. Rev. at 539):

> Suppose that the individual offender, rather than ultimately losing, eventually prevails on a full hearing of the constitutional issues. In a criminal trial he would of course suffer no punishment. In an injunctive or administrative proceeding, where a restraining order or temporary injunction has been issued against him or a permit withheld, but where a final injunction is ultimately denied or a permit granted, there is the serious problem of penalties for interim violations. If disobedience of the prior order is *ipso facto* contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute. To

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[12] In *Niemotko* v. *Maryland*, 340 U.S. 268, Mr. Justice Frankfurter, concurring, had observed at 282, 283: "What is the method to achieve such ends as a consequence of which public speech is restrained or barred? A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like. *Again, a sanction applied after the event assures consideration of the particular circumstances of a situation.*" (emphasis added) And in *Kingsley Books*, *supra*, this Court speaking through Mr. Justice Frankfurter, held, at 441: "To be sure, the limitation [of speech and the press] is the exception; it is to be closely confined to preclude what may fairly be deemed licensing or censorship."

> the extent, however, that local procedure allows such a defense to be raised in a contempt proceeding, the special objection to prior restraint growing out of the problem of interim activity is obviated.

Writing after the decision in *Times Film*, and addressing himself specifically to the question of movie censorship, Professor Bickel built upon Professor Freund's "particularistic analysis" of a decade before (*Bickel, The Least Dangerous Branch*, pp. 137-38):

> The most crucial present-day difference between prior restraints and subsequent punishments concerns what happens to the film while litigation takes its course. If it were necessarily true that a film may be exhibited—at the defendant's peril, to be sure, but nevertheless exhibited—throughout the period of criminal litigation and appellate judgment, while it may not be exhibited during the period of civil litigation following denial of a license, then the difference would indeed be major. But this is far from a necessary consequence. Mr. Freund, for example, has strongly urged that the act of disobeying the censor and showing the film without a license should be held not to be a punishable offense if the exhibitor wins the ultimate litigation. This suggestion would equalize matters.

The view espoused by Professor Freund, and endorsed by Professor Bickel, should entail the corollary view that one who declines to submit to censorship should also prevail if, in the resultant criminal

prosecution, the state cannot demonstrate the impropriety of the exhibited film. And the validity of this corollary is, of course, underscored by the view of the *Times Film* dissenters that the Chicago ordinance was constitutionally defective for the reason that, *inter alia,* it admitted "no defense in a prosecution for failure to procure a license other than that the motion picture was submitted to the censor and a license was obtained." 365 U.S. at 66. Indeed, appellant submits that this corollary follows inexorably from this Court's holdings in *Staub* v. *Baxley, supra,*[13] *Thornhill* v. *Alabama, supra, Thomas* v. *Collins, supra*—and, as to films, from this Court's *per curiam* reversal in *Gelling* v. *Texas,* 343 U.S. 960.

In any event, however, the First Amendment must compel this corollary where, as in the instant case, the state not only does not assert the impropriety of the exhibited film but *concedes the contrary.* To acknowledge appellant's constitutional right of free expression and to stamp him a criminal for exercising that right would take us back to a never-never land of jurisprudence unimagined even by the great author of *Areopagitica.*

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[13] For example, this Court there pointed out, at 321:

"It will be noted that appellant was not accused of any act against the peace, good order or dignity of the community, nor for any particular thing she said in soliciting employees of the manufacturing company to join the union. She was simply charged and convicted for 'soliciting members for an organization without a Permit' ".

## CONCLUSION

**Wherefore, it is respectfully urged that the judgment below be reversed.**

Respectfully submitted,

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September, 1964

## Appendix A

## ACT OF 1922, CHAPTER 390

(As amended by the Acts of the General Assembly of Maryland of 1927, 1929, 1939, 1941, 1945, 1947, 1955 and 1960.)

1. Definitions.

The word "film" as used in this article shall be construed to mean what is usually known as a motion picture film and shall include any film shown with or by new devices of any kind whatsoever, such as slot or coin machines, showing motion pictures. The word "view" in this article shall be construed to mean what is usually known as a stereopticon view or slide. The word "person" shall be construed to include an association, copartnership or a corporation. (An. Code, 1951, 1; 1939, 1; 1924, 1; 1922, ch. 390, 1; 1941, ch. 28.)

2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board. (An. Code, 1951, 2; 1939, 2; 1924, 2; 1922, ch. 390, 2.)

3. Creation of Board of Censors.

The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors under this article. One member of the Board shall be chairman, one member shall be vice-chairman and one member shall be secretary. They shall be appointed by the Governor, by and with the advice and consent of the Senate, for terms of three years. Those first appointed under this article shall be appointed for three years, two years and one year, respectively; the respective terms to be designated by the Governor. (An. Code, 1951, 3; 1939, 3; 1924, 3; 1922, ch. 390, 3; 1939, ch. 430.)

4. Vacancy in Board.

A vacancy in the membership of the Board shall be filled for the unexpired term by the Governor. A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the Board. (An. Code, 1951, 4; 1939, 4; 1924, 4; 1922, ch. 390, 4.)

5. Seal.

The Board shall procure and use an official seal, which shall contain the words "Maryland State Board of Censors," together with such design engraved thereon as the Board may prescribe. (An. Code, 1951, 5; 1924, 5; 1939, 5; 1924, 5; 1922, ch. 390, 5.)

6. Board to examine, approve or disapprove films; what films to be disapproved.

(a) Board to examine, approve or disapprove films.—The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) What films considered obscene.—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) What films tend to debase or corrupt morals. —For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) What films tend to incite to crime.—For the purposes of this article, a motion picture film or view

shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs. (An. Code, 1951, 6; 1939, 6; 1924, 6; 1922, ch. 390, 6; 1955, ch. 201.)

7. Certificate of approval or license.

Upon each film that has been approved by the Board, there shall be furnished by the Board, the following certificate or statement: "Approved by the Maryland State Board of Censors No. ....." and the Board shall also furnish a certificate or license in writing to the same effect, which certificate shall be the license for such film unless and until the same shall be revoked by said Board, and said certificate or license shall be exhibited by the holder thereof to any member of the Board or employee thereof upon demand. In the case of motion pictures, such statements shall be shown on the screen to the extent of approximately four (4) feet of film. Upon each film examined and approved by the Board, and upon each duplicate or print thereof, the Board shall stamp, by perforation or otherwise, the serial number and such other initials, words or designs as it may prescribe, the serial number to correspond to the number on the certificate of approval issued by the Board to be shown upon the screen. In the case of slides or views, the Board shall furnish in writing a similar certificate or license and each set of views shall have at least two slides or views shown with a similar

statement. Upon satisfactory proof being submitted to the Board that the certificate of approval attached to any film that has been examined and approved by the Board, has been lost, mutilated or destroyed, the Board shall have power in its discretion, and upon payment in advance of the fee prescribed by 11 of this article, to issue a duplicate certificate of approval. Any certificate or license issued as herein provided may be revoked by the Board for any reason which would have justified the Board in refusing to issue such license, or for any violation of law by such applicant in securing such license, or in advertising or using the film or view so licensed. Thereafter any such film may again be submitted to the Board for approval and license. (An. Code, 1951, 7; 1939, 7; 1924, 7; 1922, ch. 390, 7; 1929, ch. 555, 7.)

8. Record of Examinations.

The Board shall keep a record of all examinations made by it of films or views; noting on the record all films or views which have been approved, and those which have not been approved, with the reason for such disapproval. (An. Code, 1951, 8; 1939, 8; 1924, 8; 1922, ch. 390, 8.)

9. Report to Governor.

The Board shall report, in writing, annually, to the Governor, on or before the first day of September of each year. The report shall show:

(1) A record of its meetings, and a summary of its proceedings during the year immediately preceding the date of the report.

(2) The results of all examinations of films or views.

(3) A detailed statement of all prosecutions for violations of this article.

(4) A detailed and itemized statement of all the incomes and expenditures made by or in behalf of the Board.

(5) Such other information as the Board may deem necessary or useful in explanation of the operations of the Board.

(6) Such other information as shall be requested by the Governor. (An. Code, 1951, 9; 1939, 9; 1924, 9; 1922, ch. 390, 9; 1945, ch. 66.)

10. Oath and bond of officers of Board.

The chairman, vice-chairman and secretary shall, before assuming the duties of their respective offices, take and subscribe the oath prescribed by the Constitution of the State of Maryland, and each shall annually give corporate surety bond to the State of Maryland in such sum as the State Comptroller may prescribe, with condition that he faithfully perform the duties of his office and account for all funds received under color of his office. (An. Code, 1951, 10; 1939, 10; 1924, 10; 1922, ch. 390, 10; 1927, ch. 46; 1945, ch. 400.)

11. Fees.

For the examination of each and every one thousand feet (1,000′) of motion picture film, or fractional part thereof, the Board shall receive in advance a fee of three dollars ($3.00), where the film averages

sixteen (16) frames or less to the foot, and a fee of four dollars ($4.00) where the film averages more than sixteen (16) frames to the foot, and a fee of one dollar and twenty-five cents ($1.25) for the approval of every duplicate of one thousand feet (1,000') or fractional part thereof, where the duplicate averages sixteen (16) frames or less to the foot, and a fee of two dollars ($2.00) where the duplicate averages more than sixteen (16) frames to the foot. For the examination of each set of views, the Board shall receive in advance a fee of two dollars ($2.00) for each one hundred (100) views or fractional part thereof, and for the approval of duplicate views or prints thereof a fee of one dollar ($1.00) for each one hundred (100) views or fractional part thereof. All approvals of duplicates must be applied for by the same person within the year after the examination and approval of the original film or set of views. The Board shall receive in advance a fee of one dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of 7 of this article; and the Board shall account for and pay all fees received by it into the State treasury. (An. Code, 1951, 11; 1939, 11; 1924, 11; 1922, ch. 390, 11; 1929, ch. 555, 11; 1941, ch. 778; 1955, ch. 137; 1963, ch. 720.)

12. Offices, expenses and compensation of Board.

The Board shall provide adequate offices and rooms in which properly to conduct the work and affairs of the Board in the City or Baltimore and the State of Maryland, and the expenses thereof, as well as any other expenses incurred by said Board in the necessary discharge of its duties, and also the salaries of

the members of the Board, each of whom shall receive such compensation as shall be provided in the State budget, and each member of the Board shall be reimbursed for actual and necessary expenses incurred in furtherance of the Board's business within the State of Maryland, such as mileage, at the rate established by the Board of Public Works, hotel bills, the costs of meals and any other incidental expenses incurred in attending meetings or carrying out the other provisions of this article, such reimbursement not to exceed three thousand ($3,000.00) dollars per annum for any member of the Board. (An. Code, 1951, 12; 1939, 12; 1924, 12; 1922, ch. 390, 12; 1941, ch. 727; 1949, ch. 257; 1960, ch. 47.)

13. Disposition of fines.

All fines imposed for the violation of this article shall be paid into the State treasury. (An. Code, 1951, 13; 1939, 13; 1924, 13; 1922, ch. 390, 13.)

14. Right of entry.

Any member or employee of the Board may enter any place where films or views are exhibited; and such member or employee is hereby empowered and authorized to prevent the display or exhibition of any film or view which has not been duly approved by the Board. (An. Code, 1951, 14; 1939, 14; 1924, 14; 1922, ch. 390, 14.)

15. Obscene, indecent, etc., advertisements.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with

any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such character that its exhibition would tend to corrupt morals or incite to crime. If any such poster, banner, or similar advertising matter is so exhibited or offered to another for exhibition it shall be sufficient ground for the revocation of the certificate or license for said film issued by the Board. (An. Code, 1951, 15; 1939, 15; 1924, 15; 1922, ch. 390, 15.)

16. Enforcement; rules.

This article shall be enforced by the Board. In carrying out and enforcing the purpose of this article, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Maryland. (An. Code, 1951, 16; 1939, 16; 1924, 16; 1922, ch. 390, 16.)

17. Film submitted for approval; false statements.

Every person intending to sell, lease, exhibit or use any film or view in the State of Maryland, shall furnish the Board, when the application for approval is made, a description of the film or view to be exhibited, sold or leased, and the purposes thereof; and shall submit the film or view to the Board for examination; and shall furnish a written statement or affidavit that the duplicate film or view is an exact copy of the original film or view as submitted for examination to the Board, and that all eliminations, changes or rejections made or required by the Board in the original film or view have been or will be made in the duplicate. Any person who shall make

any false statement in any such written statement or affidavit to the Board shall, upon conviction thereof summarily before a justice of the peace, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, and any certificate or license issued upon a false or misleading affidavit or application shall be void ab initio; and any change or alteration in a film after license, except the elimination of a part or except upon written direction of the Board, shall be a violation of this article and shall also make immediately void the license therefor. (An. Code, 1951, 17; 1939, 17; 1924, 17; 1922, ch. 390, 17.)

18. Interference with Board.

It shall be unlawful for any person to hinder or interfere in any manner with any member or employee of the Board while performing any duties in carrying out the intent or provisions of this article. (An. Code, 1951, 18; 1939, 18; 1924, 18; 1922, ch. 390, 18.)

19. Notice of elimination or disapproval; re-examination; appeals.

If any elimination or disapproval of a film or view is ordered by the Board, the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of

appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals. (An. Code, 1951, 19; 1939, 19; 1924, 19; 1922, ch. 390, 19; 1955, ch. 201.)

20. Penalties in general.

Any person who violates any of the provisions of this article for which a specific penalty is not provided and is convicted thereof summarily before any magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shall be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment in the prison of the county, or in Baltimore City, where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the magistrate or justice of the peace to the Board, and by it paid into the State treasury. (An. Code, 1951, 20; 1939, 20; 1924, 20; 1922, ch. 390, 20.)

21. Particular penalties; appeal.

Any person who shall exhibit in public any misbranded film or film carrying official approval of the Board which approval was not put there by the action of the Board or any person who shall attach to or use in connection with any film or view which has not been approved and licensed by the Maryland State Board of Censors, any certificate or statement in the form provided by 7 hereof or any similar certificate,

statement or writing, or any person who shall exhibit any folder, poster, picture or other advertising matter, which folder, poster, picture or other advertising matter is obscene, indecent, sacrilegious, inhuman or immoral or which tends to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the Board, shall be guilty of a misdemeanor, and upon conviction summarily before a justice of the peace, shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisonment for not over thirty days, or be both fined and imprisoned in the discretion of the said justice of the peace. In addition to the above penalties, the Board may also seize and confiscate any misbranded film.

In all cases arising under this section there may be an appeal from the decision of the magistrate or justice of the peace where the fine imposed is in excess of fifty dollars ($50.00), or where the penalty imposed includes any term of imprisonment whatever. (An. Code, 1951, 21; 1939, 21; 1924, 21; 1922, ch. 390, 20A.)

22. Failure to display approved seal.

If any person shall fail to display or exhibit on the screen the approved seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily before any magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county, or in Baltimore City, where such offense was committed, for not less than two days and not more than five days. (An. Code, 1951, 22; 1939, 22; 1924, 22; 1922, ch. 390, 21.)

23. Exemptions; permit.

This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning. The Board may, in its discretion, without examination thereof, issue a permit for any motion picture film, intended solely for educational, fraternal, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit. (An. Code, 1951, 23; 1939, 23; 1924, 23; 1922, ch. 390, 22.)

24. Severability.

The several sections and provisions of this article are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this article. (An. Code, 1951, 24; 1939, 24; 1924, 24; 1922, ch. 30, 23.)

25. Money deposited for future rental of film—In general.

Whenever money shall be deposited or advanced on a contract for the future use or rental of motion picture films as security for the performance of the contract or to be applied to payments upon such contract

when due, such money, with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit or advance and shall be considered a trust fund in possession of the person with whom such deposit or advance shall be made, and shall be deposited in a bank or trust company by the person receiving the same, and shall not be commingled with said person's other funds or become an asset of such person or trustee, and the person so paying the same shall be notified by the bank or trust company in which said funds are deposited. (An. Code, 1951, 25; 1939, 25; 1924, 25; 1922, ch. 477.)

26. Same—Waiver.

No waiver of the provisions of 25 shall be made so as to evade the provisions of said 25 and any such waiver if so made, shall be considered null and void. (An. Code, 1951, 26; 1939, 26; 1924, 26; 1922, ch. 477.)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,

*Appellant,*

—v.—

STATE OF MARYLAND,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND MARYLAND BRANCH, ACLU, *AMICI CURIAE*

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### Interest of *Amici*

*Amici* filed this brief (with the consent of the parties on file in the Clerk's office) because of their support over the past forty-four years of the greatest freedom, under the First Amendment, for all forms of expression. We believe that the Maryland Statute which requires the prior censorship of motion pictures constricts that freedom and violates the First Amendment.

## Questions Presented

Whether a state may restrain the public exhibition of a motion picture in advance of a judicial determination that the motion picture is of a character which governmental authority may properly suppress.

## Statement

Appellant, manager of a commercial motion picture theatre, exhibited the film "Revenge at Daybreak" without obtaining permission of the Maryland Motion Picture Censor Board. An employee of the Board viewed the film and secured a warrant for appellant's arrest for failure to comply with Section 2 of Article 66A of the Maryland Code which makes it a crime to exhibit certain types[1] of motion picture films in Maryland unless the film has been submitted to and approved by the Board.

The Board is instructed by the law to approve such films "as are moral and proper" and disapprove such "as are obscene or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." Any employee or member of the Board may enter any place where films are exhibited and prevent the exhibition of any film not approved by the Board (Sec. 14). Appellant was indicted, tried, convicted and fined for violation of Article 66A. No finding was made by the Board, by its employee, or by any other forum at any time, that the film exhibited was "obscene" or otherwise of a kind tending "to debase or corrupt morals or incite to crime." On appeal, the Mary-

[1] Among films not required to be submitted to or approved by the Board are films commonly called "news reels" (Sec. 6a) and any films of whatever nature exhibited on a non-commercial basis (Sec. 23).

land Court of Appeals affirmed the action, relying upon this Court's opinion in *Times Film Corp.* v. *Chicago*, 365 U. S. 43.

## Argument

The State of Maryland contends that, in the exercise of its police power, it may legitimately punish a person for the reason alone that he showed a motion picture film, the contents of which Maryland had not approved as "moral and proper." It is conceded by Maryland that had it been given the opportunity by Appellant, the film would have been approved. In seeking thus to preserve intact its licensing system for the censorship of motion pictures, against Appellant's complaint that his arrest, conviction and punishment deprived him of his rights of free expression under the First and Fourteenth Amendments, Maryland is asking this Court to uphold a classic system of prior restraint.[2] It is submitted this system can be preserved intact only at the cost of undermining an indispensable pillar of free expression in this country. The system ought not be preserved intact, for Maryland's interest in protecting its people from films it considers "immoral" or "improper" weighs as nothing against that people's interest in gaining free access to the motion pictures of their choice.

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[2] This particular type of system appears to exist in more-or-less the same form in only three other states (New York, Virginia and Kansas), and two municipalities (Chicago and Detroit). Consult: Appendix A (State and Municipal Motion Picture Censorship Laws) hereto; Milner, *Sex on Celluloid* at 188 and Appendix B; 1964 International Motion Picture Almanac at 736-737. Laws of the same type were recently found to be invalid systems of prior restraint notwithstanding *Times Film Corp.* v. *Chicago*, *infra*, under State constitutional guarantees of free expression in Pennsylvania and Georgia. *Goldman* v. *Dana, Twentieth Century-Fox* v. *Boehm*, 405 Pa. 83, 173 A. 2d 59 (1961), cert. den. 368 U. S. 897; *Murray Productions, Inc.* v. *Floyd*, 217 Ga. 784, 125 S. E. 2d 207 (1962).

The American Constitutional abhorrence of systems of licensing and prior restraint is generally traced back to 17th century England's experience with total prohibitions upon unlicensed printing, and Blackstone's famous derivative commentary in the century that followed:

> "the liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 Bl. *Comm.** 151.

*Near* v. *Minnesota*, 283 U. S. 697, was the American case which first gave substantial judicial recognition to the pernicious character and tendency of previous restraints, while the annals of the Court since then have regularly reflected both the tenacious capacity of local governments to generate such restraints and the overriding concern of the Court to nullify them in their most dangerous aspects, if not *in toto*.[3]

This Court has long admonished that any such system of naked licensing and censorship comes before it "bearing a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U. S. 58; *Near* v. *Minnesota*, 283 U. S. 697; *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290; *Staub* v. *Baxley*, 355 U. S. 313. With respect particularly to a system of motion picture licensing, this Court determined thirteen years ago that such a previous restraint was a form of infringement "to be especially condemned." *Burstyn* v. *Wilson*, 343 U. S. 495.

Still, the Court has not always incapacitated the systems of restraints summoned before it. Thus, although it "con-

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[3] See, *e.g.*, the cases cited by the Chief Justice in his dissent to *Times Film Corp.* v. *Chicago*, *supra*.

demned" the State of New York's motion picture licensing law for requiring that "permission to communicate ideas be obtained in advance from State officials who judge the content of the words and pictures sought to be communicated," *Burstyn* v. *Wilson, supra,* the Court did not gainsay the City of Chicago's insistence upon "requiring the submission of films prior to their public exhibition." *Times Film Corp.* v. *Chicago,* 365 U. S. 43.[4] The net of the Court's pronouncements to date, as applied particularly to films and publications, appears to have been that of declining to declare "all prior restraints on speech are invalid," yet insisting that limitations on the principle which would invalidate all prior restraints can be "recognized only in exceptional cases." In short: "the phrase 'prior restraint' is not a self-wielding sword. Nor can it be a talismanic test." *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436; *Times Film Corp.* v. *Chicago, supra.* Needed, doubtless, is a middle path between a rule which might cancel all prior inhibitions to expression, and an exception so loose as could swallow the rule whole.[5] A series of recent cases may have opened up such a path.

A main trouble with licensing systems and other prior restraints is that:

> "they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration." Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. 648, 658.

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[4] The Chief Justice vigorously dissented: "Let it be completely clear what the Court's decision does. It gives official license to the censor, approving a grant of power to city officials to prevent the showing of any moving picture these officials deam unworthy of a license. It thus gives formal sanction to censorship in its purest and most far-reaching form."

[5] Compare Freund, *The Supreme Court and Civil Liberties,* 4 Vand. L. Rev. 533, 539.

This has proven to be the case whether the evil matter to be exorcised by the censor was "malicious, scandalous and defamatory" (*Near* v. *Minnesota, supra*), "obscene, lewd, lascivious or filthy" (*Manual Enterprises* v. *Day*, 370 U. S. 478; *Walker* v. *Popenoe*, 149 F. 2d 511; *Sunshine Book Company* v. *Summerfield*, 221 F. 2d 42; cert. den. 349 U. S. 921), "sacrilegious," "prejudicial," "immoral," "sexually immoral" or "harmful." (*Burstyn* v. *Wilson, supra; Gelling* v. *Texas*, 343 U. S. 960; *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684; *Superior Films* v. *Department of Education*, and *Commercial Pictures* v. *Regents*, 346 U. S. 587). Indeed, perhaps all prevailing standards for censorship will, sooner or later, be confessed to be irreducibly, impossibly, vague.

The insidious elements contained in most systems of prior restraint include: the sweeping scope of the censor's scythe, the inordinate breadth of his surveillance;[6] the tendency for the communication to be *absolutely, i.e.*, for all time, suppressed;[7] the natural propensity of the decision to be

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[6] "It subjects to government scrutiny and approval all expression in the area controlled—the innocent and borderline as well as the offensive, the routine as well as the unusual. The machinery is geared to universal inspection, not to scrutiny in particular cases which are the subject of complaint or otherwise come to the attention of prosecuting officials." Emerson, *op. cit. supra* at 656; compare Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra.*

[7] "Under a system of subsequent punishment. the communication has already been made before the government takes action; it thus takes it place, for whatever it may be worth, in the market place of ideas. Under a system of prior restraint. the communication, if banned, never reaches the market place at all. Or the communication may be withheld until the issue of its release is finally settled, at which time it may have become obsolete or unprofitable. Such a delay is particularly serious in certain areas—such as in motion pictures—where large investments may be involved." Emerson, *op. cit. supra* at 657; Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra:* "The delays in adjudication may well result in irreparable damage, both to the litigants and to the public. *The Miracle* . . . was never shown in Chicago."

adverse to free expression;[8] and the frequent unavailability of criminal or even adversary procedural protection; the narrow scope and tardiness of any available judicial review; the relative secrecy of the proceedings and absence of public scrutiny and criticism; finally, the typical incapacity of the officials involved to apply necessary aesthetic or other relevant criteria or make the sensitive Constitutional judgments required in most such cases.[9] The trouble is greatly aggravated where the standard for the censor's action is so vague (even if not too vague for Constitutional "due process") as to set him "adrift upon a boundless sea amid a myriad of conflicting currents . . .", *Burstyn* v. *Wilson, supra.*

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[8] "A communication made is a *fait accompli*, and the publisher has all the practical advantages of that position. A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment—the expenditure of time, funds, energy, and personnel that will be necessary. Under a system of prior restraint he can reach the result by a simple stroke of the pen. Thus, in one case, the burden of initial action falls upon the government; in the other, on the citizen. Again, once a communication has been made, the government official may give consideration to the stigma and the troubles a criminal prosecution forces upon the citizen. Before the communication has been issued, however, such factors would not enter the picture. For these and similar reasons, a decision to suppress in advance is usually more readily reached, on the same facts, than a decision to punish after the event." Emerson, *op. cit. supra* at 657. Compare Paul and Schwartz, *Federal Censorship* at 224-228; Douglas, J., dissenting in *Times Film Corp.* v. *Chicago, supra.*

[9] See Emerson, *op. cit. supra* at 657; Douglas, J., dissenting in *Times Film Corp.* v. *Chicago, supra:* "One stroke of the (censor's) pen is all that is needed. Under a censor's regime the weights are cast against freedom . . ."; Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra:* "The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence. . . . How different from a judicial proceeding where a full case is presented by the litigants"; Chafee, *Free Speech in the United States*, at 533; Haney, *Comstockery in America* at 176.

It is perhaps only since *Burstyn* that this Court has come to realize how even the standard of "obscenity" leaves censors recklessly adrift, and that close judicial superintendence, reaching as high as necessary, may be the only means of assuring freedom for expression which is not prurient, patently offensive, and utterly worthless, and thus unable to lay claim to Constitutional protection, under the decisions of this Court.[10] *Jacobellis* v. *Ohio*, 378 U. S. 184; *A Quantity of Books* v. *Kansas*, 378 U. S. 205; *Grove Press* v. *Gerstein*, 12 L. Ed. 2d 1035; *Manuel Enterprises* v. *Day*, 370 U. S. 478; *Bantam Books* v. *Sullivan*, 372 U. S. 58.

A system of prior restraint over communication geared to standards like "obscenity" ought to be allowed by this Court to function, if at all, only if due allowance has been, or can be, made to nullify the system's natural vices. One requirement must be for a judicial superintendence of the system's actions so close as to be either immediate or part and parcel of the system itself. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 346;[11] *Marcus* v. *Search Warrants*, 367 U. S. 717; *A Quantity of Books* v. *Kansas, supra.*

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[10] Licensing Systems have been sometimes defended, and sometimes tacitly supported, even by the persons and concerns censored and licensed, because of the opportunity afforded to "find out what is forbidden without incurring the danger of criminal or similar sanctions" if the person's or concern's uncensored judgement or interpretation of the law, were wrong. (See *Emerson, op. cit. supra* at 659). From the public and constitutional viewpoint, of course, almost nothing could be worse than a system which efficiently and quietly and happily works to censor our media of communication and expression. As little as may perhaps be done by the Courts to prevent such censorship as takes places under private auspices, there should be no hesitation in voiding on Constitutional grounds any such system of governmentally imposed and enforced licensing. See *Bantam Books* v. *Sullivan, supra.*

[11] In his dissenting opinion the Chief Justice observed: "Certainly, *in the absence of a prior judicial determination* of illegal use, books, pictures and other objects of expression should not be destroyed."

In his dissent in *Times Film Company* v. *Chicago, supra*, he found the Chicago film censorship plan defective in that it "makes

In addition, there must be adequate notice and full opportunity for an adversary hearing prior to the imposition of any effective restraint. *Walker* v. *Popenoe*, 149 F. 2d 511; *Sunshine Book Co.* v. *Summerfield*, 221 F. 2d 42, cert. den. 349 U. S. 921; *Kingsley Books, Inc.* v. *Brown, supra; Marcus* v. *Search Warrants, supra; A Quantity of Books* v. *Kansas, supra; Bantam Books* v. *Sullivan, supra; cf. Manuel Enterprises* v. *Day, supra* (concurring opinion of Mr. Justice Brennan).

If the Maryland system for the licensing of motion picture expression is examined in these respects, it appears notably deficient. As constituted by the Maryland legislature, the Maryland system makes no allowance for any judicial check whatsoever upon the conclusions drawn or actions taken by the Board of Censors, or indeed by any member or employee of the Board, with respect to a particular film—until *after* the restraint upon circulation is imposed. If a person submits his film in advance to the Board it may be disapproved and its exhibition restrained without recourse to a Court; if a person shows his film without submitting it in advance to the Board, the Board or any of its employees may—according to Maryland's contentions here—suppress its exhibition. This can be done, as here, by procuring a warrant for the arrest of that exhibitor on the ground, and upon a showing, not that he has shown or is about to show an "obscene" film, but on the ground or upon a showing that he has shown, or is about to show, "a film." Here, then, is no room at all for that "judicial superintendence" (*Bantam Books* v. *Sullivan, supra*), that "adversary hearing" (*A Quantity of Books* v. *Kansas, supra*) that "adequate notice, judicial hearing, and fair de-

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no provision for prompt judicial determination" and that "the censor performs free from all procedural safeguards afforded litigants in a court of law."

termination". (*Kingsley Books, Inc.* v. *Brown, supra*) already laid down by this Court as minimum requisites to support a licensing system otherwise so directly obnoxious to the Constitutional canons and traditions of our free society that it does not shrink from describing its chief organ as the "State Board of Censors" (Section 2), nor from compelling every film audience in the State "captively" to view at each performance four feet of film certifying that the film to be viewed was found by the State to be moral and proper. (Sections 7 and 22.)

Failing to conform to minimum Constitutional requisites of a prior judicial hearing and determination, Maryland's film censorship law cannot prevail against a person punished for refusing to submit thereto. It should be faced that, as a consequence, Maryland's Board of Censors should in future be unable to prevent a film from being shown—prior to a time when it or others might be able to cause a criminal prosecution to be brought, or a judicial restraining order or injunction to be issued against further showings. This much social "risk" is Constitutionally imperative and has long been assumed by most of our States and municipalities. (See authorities cited, note 2, *supra*.) As much was long ago also recognized, for example, in connection with the Post Office's efforts to restrain "obscenity" from passing through the mails. As Judge Thurman Arnold said:

> "We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intentionally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. . . . But often mailing privileges are revoked in cases where

> the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here. Appellees have been prevented for a long period of time from mailing a publication which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury." *Walker* v. *Popenoe, supra.*[12]

It has been this nation's birthright, and its continual learning as well, with regard to all the other principal media of expression, that no office should have any chance to examine material in advance nor to restrain any from circulation. Few other features of our press have so sharply marked it off from those which obtain in totalitarian and less democratic nations and regimes, friendly and unfriendly. There is no reason why our motion picture exhibitors can validly be hobbled in this respect where our newspapers and magazine distributors, our phonograph record outlets, our radio and television broadcasters, cannot. While the home television screen may be considered the closest to motion picture projection, in form and impact, no power of the Federal Communications Commission or of any local government agency could be claimed, or applied, to withhold from appearance at any time, in American homes, of "obscene," "immoral," or "improper" pictures. No power, that is, greater than the threat of subsequent punishment—by fine, imprisonment and/or loss of broadcast license. See *Allen B. Dumont Labs.* v. *Carroll,* 184 F. 2d 153, cert. den. 340 U. S. 929. And though this

[12] The unconstitutionality of the Post Office power to stop mail it considers obscene, without a prior hearing, has not been squarely ruled upon by this Court. As Mr. Justice Brennan's concurring opinion in *Manuel Enterprise* v. *Day, supra,* intimates, the power is almost certainly inconsistent with the guaranties of free expression.

Court has suggested that in times of national emergency, the government might seek to restrain "the publication of the sailing dates of transports or the number and location of troops" (*Near* v. *Minnesota, supra,* at 716), it has never been suggested that even in such a perilous moment, all our newspapers could be compelled to submit their issues to examination in advance of sale. (See Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra.*)

Section 2 of the Maryland motion picture censorship Act thus cannot be allowed to stand as valid support for the punishment of a motion picture exhibitor who chooses to show a film without approval of Maryland's Board of Censors. Other parts of the law are highly questionable.[13] As to Section 17's requirement that Maryland's Board of Censors be provided with a copy of each film to be shown, this much may not necessarily be repugnant to Constitutional requirements, *and* this may be all that *Times Film Corp.* v. *Chicago, supra,* was meant to, or need, stand for.

> "We have concluded that [the section] of Chicago's ordinance requiring the submission of films prior to their public exhibition is not, on the grounds set forth, void on its face."

Any mis-use by the Board of any such residual prerogative to offer advisory opinions,[14] any mis-use in the manner, for example, of the activity engaged in by the Rhode Island Commission to Encourage Morality in Youth (*Bantam*

[13] Sections 14 and 16 purport to extend to Board members and employees the unreasonable power to search theatres without a warrant and privately arrest any showings. Art and entertainment films are discriminated against, as compared with news films, by Section 6a. Commercial films are discriminated against, as compared with "non-profit" showings, by Section 23. The tax imposed may be void under *Grosjean* v. *American Press Co.*, 297 U. S. 233.

[14] See note 10 *supra.*

*Books* v. *Sullivan, supra*), would present another case. Here and now it may be enough to recognize that Appellant's conviction for violating Section 2 must be reversed. He was arrested, tried and convicted in clear violation of his Constitutional rights to exhibit a film free of prior administrative restraint, free of censorship.

## CONCLUSION

**For the reasons stated above, the conviction must be reversed.**

Respectfully submitted,

September 1964.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,

*Appellant,*

—v.—

STATE OF MARYLAND,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## APPENDIX
## TO
## BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND MARYLAND BRANCH, ACLU *AMICI CURIAE*

## APPENDIX A

March 2, 1964

### State and Municipal Motion Picture Censorship Laws*

| State | Statute Citation | Censoring Body | Standard |
|---|---|---|---|
| Kansas | Kansas Gen. Statutes Ann. Sec. 51-101 to 51-114, 74-2201 to 74-2209 (1949) | 3-member Board of Review | Approval of films which are "moral and proper" and disapproval of films which are "cruel, obscene, indecent or immoral or such as tend to debase or corrupt morals". |
| Maryland[1] | Maryland Ann. Code Art. 66-A, §§1-26 (1922 as amended) | 3-member State Board of Censors | Approval of films which are "moral and proper", disapproval of films which are "obscene or such as tend in the judgment of the Board to debase or corrupt morals or incite to crimes". |
| New York[2] | New York Education Law §§122-132 (1927 as amended) | Director of Motion Picture Division, Review by Board of Regents | "obscene, indecent, immoral, inhuman or is of such character that its exhibition would tend to corrupt morals or incite to crime". |
| Virginia[3] | Virginia Code, Title 2, §§98-116 (1930 as amended) | 3-member Censor Board, Superintendent of Public Instruction in case of tie. Review by Division of Motion Picture Censorship | "obscene, indecent, immoral, inhuman, or is of such character that its exhibition would tend to corrupt morals or incite to crime". |

* As Compiled by the Motion Picture Association of America, Inc.

[1] Constitutionality of statute upheld in *State* v. *Freedman*, (Maryland Court of Appeals) appeal to U.S. Supreme Court, pending.

[2] Consitutionality of statute currently under attack in *TransLux* v. *Regents*, (N. Y. Court of Appeals).

[3] Constitutionality of statute under attack in *Victoria Films* v. *Virginia*, (Richmond Circuit Court).

## Municipal Censorship Ordinances

The following compilation includes municipal ordinances which provide for censorship of motion pictures. Many of the ordinances, although still carried on the books of various communities, have not been enforced in many years and boards created by them are completely inactive. These ordinances, however, may be occasionally enforced if a "problem" picture is shown or scheduled to show in a community.

In most instances, although detailed standards are contained in the ordinances, only the standard of "obscenity" is in fact applied by the Boards.

There may be additional ordinances which have been enacted by other municipalities which have not been brought to the attention of the Motion Picture Association.

The compilation does not include criminal statutes which provide for the prosecution of persons distributing, exhibiting, or selling obscene matter including motion pictures.

The ordinances are divided into three groups:

Group 1 contains ordinances requiring the submission of all motion pictures to a censor or censor board for censorship and licensing prior to exhibition.

Group 2 contains ordinances requiring that the censor or censor board be given notice prior to exhibition of the motion pictures to be exhibited in the community, with the Board having power to view those motion pictures it desires to see and in some instances to ban or demand eliminations prior to exhibition.

The third group contains ordinances which empower a censor or censor board to view motion pictures during their exhibition in local theatres and at that time to demand the withdrawal of the picture or eliminations in it.

March 2, 1964

## MUNICIPAL CENSORSHIP ORDINANCES

### I. License or Permit Required Prior to Exhibition

| City | Ordinance Citation | Censoring Body | Standard Applied |
|---|---|---|---|
| Atlanta, Ga.[1] | 1942 Code, Sections 5-305, 58-107, 58-108, Ordinance 12/5/44 | Censor and Board of Censors | "obscene or licentious" or "affect the peace, health, morals and good order" |
| Chicago, Ill.[2] | Municipal Code, Sections 155-1 to 155-7 | Commissioner of Police | "immoral or obscene, or portrays depravity, immorality, or lack of virtue of a class of citizens of any race, color, creed or religion and exposes them to contempt, derision or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit." |
| Detroit, Mich. | Municipal Code, 1954 Chapter 89, Section 20 | Commissioner or Superintendent of Police | "indecent or immoral" |
| *Evanston, Ill.[3] | City Code, Article II Sections 35-28 to 35-38 | Motion Picture Consultant and Motion Picture Appeals Board | "objectionable" |
| Fort Worth, Tex. | Ordinance No. 2475 | Eight-member Board of Censors | "obscene, immoral, indecent or is calculated to promote or encourage racial or sectional prejudices, indecency or immorality or is reasonably calculated to corrupt the morals of youth" |

* Ordinance Inactive.

[1] Held unconstitutional in *Murray* v. *Gordon*, 217 Ga. 784, 125 S.E. 2d 207 (1962).
Classification ordinance enacted, June, 1962 and declared unconstitutional in *Columbia* v. *City of Atlanta, Georgia*, Sup. Ct., October, 1963.

[2] Amended to include a provision for classification and review board, December, 1961.

[3] Amended to include classification, July, 1962. Standard applies only to classified films.

## I. License or Permit Required Prior to Exhibition (Cont'd)

| City | Ordinance Citation | Censoring Body | Standard Applied |
|---|---|---|---|
| *Kansas City, Mo. | Revised ordinances of Kansas City, 1956, Chapter 51, Sections 51-1 to 51-1.11 as amended | Motion Picture Reviewer (appointed by Director of Welfare) | "obscene, indecent, or which tends to debase or corrupt morals or incite to crime. Within the meaning of this section, a film shall be deemed obscene or indecent when said film portrays human nudity or simulation thereof, partial nudity which is sexually immoral or offensive to public decency, dances suggesting or representing sexual actions or indecent passion or emphasizing indecent movements, lewd poses and gestures, lustful embraces, or any other acts, representations, or expressions of erotic or pornographic nature calculated to stimulate sexual desire or lascivious thoughts; or presents acts related to sex which constitute felonies or misdemeanors under the state laws of Missouri; or presents scenes portraying sexual hygiene, sex organs, abortion, methods of contraception, venerial diseases, or scenes of actual human birth. A film shall be one that tends to debase or corrupt morals or to incite to crime when the theme or manner of presentation is of such character as to present the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable, or commonly accepted behavior, or if it advocates or teaches use of narcotics, or habit-forming drugs, or portrays such use in a way to stimulate curiosity concerning such use." |

* Ordinance Inactive.

I. LICENSE OR PERMIT REQUIRED PRIOR TO EXHIBITION (Cont'd)

| City | Ordinance Citation | Censoring Body | Standard Applied |
|---|---|---|---|
| *Mount Clemens, Mich. | Ordinance enacted 6/1/44, recorded Book 5, Page 54 | Censor appointed by City Commission | "detrimental to the public morals or not approved by the Detroit Police Department" |
| *Pasadena, Calif. | Ordinance No. 3035 as amended 6/17/39 | Three-Member Board of Review | "indecent, obscene or immoral character" |
| Portland, Ore.[4] | Ordinance No. 97898, Sections 16-3001 to 16-3010 (2/13/53) | Chief of Police | "indecent, immoral, obscene, suggestive, immodest or designed or tending to ferment religious, political, racial or social hatred, antagonism or detrimental to the public peace and welfare" |
| Providence, R. I. | City Chapter XXXII, Sections 159-171 | Amusement Inspector (member of Police Force) | "obscene, impure or manifestly tending to the corruption of the morals of youth . . . lewd, wanton or lascivious" |
| *Sacramento, Calif. | Ordinance No. 532, 12/3/31 | Censor Board composed of Chief of Police and City Manager | "offensive to public morality and decency, will delineate any lewd or indecent act or any other matter or thing which is lewd, obscene or vulgar or which is of an obscene, indecent, or immoral nature or so suggestive as to be offensive to the moral sense" |

* Ordinance Inactive.

[4] Declared unconstitutional in the *City of Portland* v. *Welch*, 229 Oregon 308, 367 P. 2d 403, 1961.

## I. License or Permit Required Prior to Exhibition (Cont'd)

| City | Ordinance Citation | Censoring Body | Standard Applied |
|---|---|---|---|
| *San Angelo, Tex. | Ordinance No. 247, 7/2/20 | Six-member Board of Censors | "obscene, immoral or indecent or is calculated to promote or encourage indecency or immorality" |
| *Waukegan, Ill. | 1936 City Code, Chapter 54, Sections 587 to 596 as amended by Ordinance No. 57-0-108, 8/19/57 | Seven-member Board of Censorship | motion pictures not released by "a national producing organization and passed upon by the National Preview Committee" if "indecent or lewd or obscene" |
| *Wichita Falls, Tex. | Codified ordinances, Chapter 5, Sections 4-501 to 4-5014 (1941) | Two or more Censors of commercialized amusements (appointed by Mayor) | "calculated to corrupt the morals of youth or is indecent, low or vulgar or calculated to promote racial prejudice or create disorder or is reasonably calculated to cause a disturbance of the peace" |
| *Winnetka, Ill. | Winnetka Code, Art. 5, Sections 252 to 260 | Village Censor | "obscene or immoral" or pictures "which portray any notorious, disorderly or any other unlawful scene or which have a tendency to disturb the peace or which depict or suggest crime, the scenes of crime or the methods of criminals" |

* Ordinance Inactive.

## II. Advance Notice Required—No Permit or License Necessary

| City | Ordinance Citation | Censoring Body | Advance Notice | Standards |
|---|---|---|---|---|
| Abilene, Texas | No ordinance citation. Ordinance passed August, 1961 | 8-member Exhibition Review Board | Month in advance of exhibition | "obscene". |
| Birmingham, Ala. | Ordinance No. 1022 adopted 12/8/53 amending Sections 1204 to 1208 of 1944, General City Code | Chief of Police | Written notice required 24 hours prior to exhibition | "a human being (other than a babe in arms) in a nude state or condition, or, by reason of transparency of clothing or drapery in substantially nude state or condition; or in which is exhibited, shown, pictured, represented or suggested any indecent, obscene, lewd, filthy, vulgar, lascivious, or immoral act, scene, posture or matter; or in which is exhibited, shown, pictured or represented any suicide, unless shown in a flash, or any hanging, lynching or execution of a human being; or in which is exhibited, shown, pictured or represented any female in a drunken state, unless reduced to a flash, or any rape or attempt at rape, or any childbirth or any domestic or conjugal infidelity of an immoral nature upon the part of either husband or wife, or any bawdy house or transaction therein, or the plying of the trade of a procurer, procur- |

II. Advance Notice Required—No Permit or License Necessary (Cont'd)

| City | Ordinance Citation | Censoring Body | Advance Notice | Standards |
|---|---|---|---|---|
| | | | | ess, cadet or other person who profits directly from prostitution of one or more females, or the seduction or attempted seduction of any person, or immoral or unlawful sexual conduct or relations'' |
| •Gary, Ind. | 1949 Code, Chapter 29, Sections 26 to 36 | Six-member Board of Censors | Upon demand and as far in advance as possible | ''immoral, lewd or lascivious character . . . inimical to the public safety, health, morals or welfare within the city'' |
| •Lansing, Mich. | Ordinance No. 72, 12/13/15 | Police and Fire Commission | Three days notice | ''contrary to good order and public welfare and tends to reflect reproach upon any race or incite race hatred, race riots and which stirs up race prejudice and tends to disturb the public peace'' |
| Mephis, Tenn.[5] | Municipal Code, 1949, Article II, Chapter 33, Sections 943-951, City Charter, Art. IX, Sections 439-443 | Five-member Board of Censors | As far in advance of intended exhibition as possible | ''immoral, lewd, or lascivious, inimical to the public safety, health, morals, or welfare or denouncing, deriding or seeking to overthrow the present form of national government'' |

• Ordinance Inactive.

[5] Test of constitutionality now pending in *Embassy* v. *Hudson* (U. S. Dist. Court for W. D. Tenn.)



II. Advance Notice Required—No Permit or License Necessary (Cont'd)

| City | Ordinance Citation | Censoring Body | Advance Notice | Standards |
|---|---|---|---|---|
| •Spokane, Wash. | Ordinance No. C-2095 as amended | Commissioner of Public Safety and 12-member Reviewing Board | Fifteen Days Written Notice | ''obscene and improper, licentious or immoral or which tends to incite race riots or race hatred that would have a harmful influence upon the public'' |
| •West St. Paul, Minn. | Ordinance No. 438 approved 9/25/56 | Police Commission | Seven days prior to exhibition | ''immoral, obscene, lewd, or lascivious or any indecent character or which tends to create or incite race or religious prejudices or hatred of any individual creed or nationality.'' |

III. No Advance Notice Required—Review During Regular Performance

| City | Ordinance Citation | Censoring Body | Standards |
|---|---|---|---|
| *Bellingham, Wash. | City Code, Chapter 17.18, Sections 17.18.010 to 17.18.060 | Eighteen-member Censor Board | |
| *Bridgeport, Conn. | City Ordinances, Section 48-7, 1959 Revision | Superintendent of Police | "blasphemous, indecent or contrary to good morals" |
| Columbus, Ohio | City Code, Chapter 562, Sections 562.01-562.05 (November, 1961) | 15-member Motion Picture Review Board | "violates laws of Ohio or Columbus Code" |
| *Denver, Colo. | Ordinances, Article 911, Section 10 | Manager of Safety and Excise | "immoral or indecent character" |
| *Greeley, Colo. | Ordinances, Section 15-113 | Chief of Police | "indecent, immoral or lewd" |
| *Greensboro, N. C. | Ordinances, Chapter 50, Sections 50.1 to 50.14, 2/17/55 | Board of Public Amusement | "obscene, immoral, or objectionable" |
| *Highland Park, Ill. | Ordinance No. 687, Section 11 | Chief of Police | "depicting the commission of crime . . . immoral or questionable" |
| Houston, Tex. | 1942 Code, Sections 25-2 to 25-3 | Tax Assessor | "obscene, immoral, indecent, unlawful, unsanitary, unhealthy, or calculated to promote or encourage racial or sectional prejudices, obscenity, indecency, immorality, unlawfulness, unsanitary or unhealthy conditions or disturbances of the peace" |

* Ordinance Inactive.

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III. No Advance Notice Required—Review During Regular Performance (Cont'd)

| City | Ordinance Citation | Censoring Body | Standards |
|---|---|---|---|
| Little Rock, Ark. | Ordinance No. 7826, Amended by ordinance Nos. 9844 and 10950, 12/27/48 | 15-member Censor Board | "indecent, immoral, obscene, profane, licentious, lewd, or against public morals" |
| *New Haven, Conn. | Ordinances, Chapter II, Sections 24 through 26 | Chief of Police | "indecent or blasphemous . . . lewd, indecent or vulgar or pictorially represent the commission or the attempt to commit any crime or bodily violence" |
| *Oklahoma City, Okla. | 1948 Oklahoma City Revised Ordinances, Title 7, Sections 63 to 65 | Mayor | "indecent, lewd or immoral character, . . . suggesting or depicting unlawful or forbidden crimes . . . showing or depicting any ex-convicts or convicts, outlaw or outlaws, bandit or bandits, engaged in the commission of their former crimes or in any crimes in which said ex-convicts or convicts, outlaw or outlaws, bandit or bandits, are made the feature of said show" |

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III. No Advance Notice Required—Review During Regular Performance (Cont'd)

| City | Ordinance Citation | Censoring Body | Standards |
|---|---|---|---|
| *Palo Alto, Calif. | Ordinance No. 1277, Administrative Code, Section 253, and Ordinance No. 5, Sections 15.01, 15.03 | Board of Commercial Amusements | "to be of obscene, indecent or immoral nature or presents any gruesome, revolting or disgusting scenes of subjects or tends to disturb the public peace or tends to corrupt the public morals" |
| *Rockford, Ill. | City Code, Chapter 5, Article I, Sections 5-1 to 5-7 | Censorship Committee consisting of the Mayor, Chief of Police and a member of the City Council | "immoral or obscene, salacious or touches false ethics or which contains nakedness or suggestive dress, prolongs passionate love scenes or scenes making crime, drunkenness or the use of narcotics attractive or which depicts the commission of crime, the white slave traffic or resistance to police authority or scenes that are unduly horrible" |
| *San Diego, Calif. | Ordinance No. 3682, Sections 16.01 to 16.05, 3/9/48 | Director of Social Welfare | None |
| Seattle, Wash.[7] | Ordinance No. 83099, Sections 1-7 (6/1/54) as amended by Ordinance No. 85472 (9/5/56) | Thirteen-member Board of Theatre Supervisors | "obscene, indecent, or immoral nature or character; or wherein any scene of violence is shown or presented in a gruesome or revolting manner, or in a manner which tends to corrupt morals or which is offensive to the moral sense" |

[7] Section 1 held unconstitutional in *Seattle* v. *Johnson*, unreported (Sup. Ct. Wash. 1962) ordinance amended, 2/4/63 to provide for classification.

* Ordinance Inactive.

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III. No Advance Notice Required—Review During Regular Performance (Cont'd)

| City | Ordinance Citation | Censoring Body | Standards |
|---|---|---|---|
| *Sioux City, Iowa | Chaper 143, Sections 143-5 to 143-6 | Mayor, City Manager, Chief of Police or any member of City Council | "depicting illegal acts, burglaries, safe-cracking, holdups, stagecoach or train robberies, or acts of immoral or indecent nature" |
| *Tacoma, Wash. | City Code, Chapter 8.32, Sections 8.32.010 to 8.32.090 | Five-member Board of Censors | "immoral, obscene, lewd, lascivious, suggestive or of any indecent character; or which shall tend to exert a harmful influence upon public morals; or which tends to glorify crime; or which portrays brutality; or which shall tend to disturb the public peace" |
| *Trenton, N. J. | Article 12, Sections 15-118 to 15-122 | Director of Public Safety | "offense against public decency or morals . . . objectionable from a moral standpoint or is likely to create public disorder" |
| *Waco, Texas | City Charter, Article 281 | Board of Commissioners | "indecent, immoral or calculated to affect injuriously the morals of the people" |

13a

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,
*Appellant,*

v.

STATE OF MARYLAND,
*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## BRIEF OF APPELLEE

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## BRIEF OF APPELLEE

### STATEMENT OF THE CASE

The Appellee generally accepts the Statement of the Case made by Appellant, but wishes to make the following additions and corrections thereto.

When Appellant telephoned Mrs. Holland at the office of the Maryland Board of Censors (hereinafter referred to as the "Board") on November 1, 1962, to announce his intention to exhibit a film which had not been presented for licensing, she told him this would be in violation of the law, but he replied that that was his purpose, in order to test the constitutionality of motion picture censorship (R. 7). When Mrs. Holland served a violation notice on Freedman after she had seen the film, he accepted it in the presence of his attorney (R. 8).

Appellant is well acquainted with the administrative machinery of the Board (R. 15).

The Board's reviewers do not look at *every* movie that comes into Maryland, except newsreels, as stated on page 6 of Appellant's Brief. Rather, they look at all movies, other than newsreels, which are to be exhibited for commercial purposes (R. 27, 45; Section 23 of Article 66 of the Maryland Code, App. 13).

The questioning, at trial, of Mr. Mason and Mrs. Schecter, established only that counsel for the Appellant has a more detailed familiarity with obscenity litigation than do these lay Board members.

Although the Board's receipts have exceeded its disbursements in most years since 1920 (Def. Ex. No. 5; R. 22, 62), the fiscal years ended June 30, 1959, and June 30, 1962, both showed a net loss of revenue to the State, as would the year ended June 30, 1961, had it not been for the $1,577.65 unexpended appropriation (R. 62, 67, 73).

## QUESTIONS PRESENTED

1. Can a movie house operator who, in brazen and deliberate defiance of statutory law, publicly exhibits a film without having first submitted it to the Maryland State Board of Censors and secured a seal of approval therefor, alchemize the innocuous nature and content of that film into a freedom-of-speech defense to his criminal prosecution?

2. Is Maryland's system of regulating the motion picture business — by requiring films which are to be commercially exhibited first to be submitted to an administrative board for preview and licensing — utterly repugnant to a movie house operator's rights of free speech?

3. Does Appellant have standing to challenge any portion of Article 66A of the Maryland Code other than Section 2?

## ARGUMENT

### I.

### Introduction

The present controversy is a fabrication with which Appellant hopes to destroy the criminal sanction of Maryland's motion picture censorship law and with it the functions of every administrative film review board in the United States. Let there be no doubt about it. His defiant exhibition of an innocuous film directly inviting criminal prosecution was a maneuver executed to permit Appellant's brief in this Court to radiate a bright innocence of subject matter with the aid of which he now seeks to surprise and overwhelm all those who have tried with earnest high purpose, by varying means of film preview, to prevent the unscrupulous commercial exploiters of obscenity from gaining uncontrollable license to produce and exhibit what they will. This is the Armageddon of motion picture censorship. If Appellant's maneuver is successful, by exhibiting a bland film without submitting it to the Board, he will have gained the right to exhibit an obscene film without submitting it to the Board, a Trojan Horse deception already thoroughly appreciated by the industry. See The Film Daily, Oct. 2, 1964, p. 1, col. 2.

And this is not really the case of Ronald L. Freedman of Baltimore. He is just a set piece for his distributor, which happens to be Times Film Corporation (R. 6), the very same organization that, with the very same chief counsel, presented the last motion picture censorship case considered by this Court.

## II.

## The Maryland Court of Appeals Correctly Held, on Authority of Times Film Corporation v. Chicago, that the Maryland Censorship Law Is Not Void on its Face.

### A.

*The* TIMES FILM *decision controls this appeal.*

But for the deadly seriousness of this litigation and the observation that "[w]hat is one man's amusement, teaches another's doctrine" (*Winters v. New York*, 333 U.S. 507, 510, 92 L. Ed. 840, 847 [1948]), one might find diversion in Appellant's busy efforts to convince this Court that there are compelling distinctions between this appeal and the petition of *Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L. Ed. 2d 403 (1961).

Actually, the present litigation is the second round, almost a reprise, of the *Times Film* case. The personalities and their mission have not changed. Only the tactics are different.

There, an application for a permit was made and the license fee tendered but submission of the film, "Don Juan", for examination was refused. Here, Appellant refused to do any of these things and argues that the license fee is a tax upon the exercise of free speech.

There, the distributor initiated litigation by filing a complaint in a federal district court seeking injunctive relief against having to submit to consorship. Here, the distributor's licensee began the litigation by announcing his intention to exhibit an unlicensed film — "Revenge at Daybreak" — for the purpose of "challenging the constitutionality of motion picture censorship" (R. 7).

There, no one knew, at least officially, whether the film was or was not legally obnoxious and the statutory stand-

ards for review were not attacked, the distributor arguing that it did not make any difference, that the film was presumed to be nonobscene*, and that no prior submission for examination could constitutionally be required. Here, the distributor's licensee has undertaken, deliberately and elaborately, both to establish the innocence of the film as a matter of record and to demonstrate that the standards of review in Maryland are unenforceably vague.

These changes in presentation are the only identifiable distinctions between Times Film and this case. The Appellant asserts that these shifts of emphasis make *Times Film* "vastly different". But, in truth, they are a disguise, imperfectly hiding the same cause.

The claim advanced here is intrinsically indistinguishable from the claim advanced there: that "this concrete and specific statutory requirement, the production of the film at the office of the [Board] for examination, is invalid as a previous restraint on freedom of speech" (365 U.S. at 46, 5 L. Ed. 2d at 405). The claim was there presented directly. It is here sought to be presented indirectly — by contending that criminal prosecution to coerce submission to the Maryland film licensing statutes imposes an impermissible burden upon free speech. But even the American Civil Liberties Union and Maryland Branch, ACLU, *Amici Curiae*, candidly recognize the identity between the substance of this appeal and that of the *Times Film* case. At the outset of their presentation they state the question presented to be (*Amici Brief*, p. 2):

> "Whether a state may restrain the public exhibition of a motion picture in advance of a judicial determina-

---

* See footnote 4 at pp. 13-14 of Appellant's Jurisdictional Statement. That this Court could have considered "Don Juan" to be "the vilest of pictures" was an extreme position "that petitioner . . . argued at one time in the case". 365 U.S. at 55, 5 L. Ed. 2d at 411.

> tion that the motion picture is of a character which governmental authority may properly suppress."

This clearly reflects the oneness of purpose in the two cases: to eliminate, by judicial order, the necessity for prior administrative licensing of motion picture films.

To assert that the State is here the moving party gains the Appellant no advantage. As a statement of fact, the assertion is compromised by Appellant's invitation to prosecution for the announced purpose of testing the constitutionality of censorship. As a distinction in law it also fails, because both the purpose of litigation (from the viewpoint of Freedman as exhibitor as well as Times Film Corporation as distributor) and the national effect of this Court's decision are unchanged from the *Times Film* presentation.

To assert that the subject film "would have been approved had it been submitted for licensing" is also ineffective, because, although this Court's decision in *Times Film* may have been *additionally supported* by the lack of record evidence as to the nature and content of the film there at issue, the majority opinion did not depend upon that finding. "Moreover" was the word used by Mr. Justice Clark to introduce his discussion of subject matter (365 U.S. at 46, 5 L. Ed. 2d at 406). It is the word for which the three omission dots have been substituted at the beginning of the second quotation on page 15 of Appellant's Brief.

The presence or absence in this record of evidence as to the nature and content of the unlicensed film is a wholly neutral circumstance in the consideration of whether *Times Film* controls this case, because the issue there professedly decided — that there is no constitutional freedom to exhibit a motion picture without any prior review by governmental

authorities — necessarily means, in conversion, that one cannot with impunity defy a statutory requirement that every commercial film be submitted for examination and licensing prior to its exhibition before the paying public. This was acknowledged by the majority when Mr. Justice Clark stated the appellant's claim to be a challenge to the statutory requirement of submission for examination (365 U.S. at 45-46, 5 L. Ed. 2d at 405). This was also acknowledged by the dissenting justices when Mr. Chief Justice Warren, speaking for them, restated the issue thus (365 U.S. at 55, 5 L. Ed. 2d at 411):

> ". . . whether the City of Chicago — or, for that matter, any city, any State or the Federal Government — may require all motion picture exhibitors to submit all films to a police chief, mayor or other administrative official, for licensing and censorship prior to public exhibition within the jurisdiction.
>
> "The Court does not even have before it an attempt by the city to restrain the exhibition of an allegedly 'obscene' film . . ."

(365 U.S. at 67, 5 L. Ed. 2d at 418):

> ". . . The inquiry, as stated by the Court, but never resolved, is . . . whether licensing, as a prerequisite to exhibition, is barred by the First and Fourteenth Amendments."

This Court held in *Times Film* that a statutory requirement of preview of all films prior to public exhibition was not constitutionally void on its face. The Maryland Court of Appeals took proper cognizance of that holding in the present litigation. *Freedman v. State*, 233 Md. 498, 504, 197 A. 2d 232, 235 (1964). Accordingly, no place remains for an argument that the use of criminal sanctions to enforce the requirement of preview is forbidden whenever it can later be demonstrated that the unreviewed film neither excites nor incites. This was effectively noted by

the justices who dissented in *Times Film* when Mr. Chief Justice Warren observed that even after submission of a film and a refusal to license, "there is ordinarily *no defense* to a prosecution for showing the film without a license". (Emphasis supplied. 365 U.S. at 74, 5 L. Ed. 2d at 421-422.) And, as the Court concluded therein (365 U.S. at 50, 5 L. Ed. 2d at 408):

> ". . . It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances. . . ."

B.

*The* TIMES FILM *decision should be reaffirmed.*

Because both the Appellant and the *Amici Curiae* have here undertaken a wide, if unconvincing, assault upon the whole legislative structure of movie censorship and because four justices of this Court indicated their sympathy with the purposes of such an assault by joining in dissent from the *Times Film* holding, the following observations are pertinent.

Neither the evocation of 17th century English history nor the platooning of 20th century American free speech decisions provides any real strength to their assault line because, for all of the brave language thus made available, none of it has strength and meaning in the context of the present battle.

The struggle of the English press for freedom from license is an early chapter in the long history of the fight to express unpopular religious, political and economic opinions without regulation beyond that necessary to keep the peace. And it is the more recent portion of this history which puts in common ranks such constitutional eminences

as the American Press Company, J. M. Near, Newton Cantwell and R. J. Thomas. Many arguments have been advanced for the constitutional protection of newspapers, labor union organizers, and the most obnoxious evangelists, but the one which has significant and enduring value is that which spares the critics and the dreamers from prior restraint simply because, in the areas of religion, politics and economics, there is no acceptable alternative compatible with our national concept of organized democratic society.

As to commercial motion picture exhibition, however, none of this history has any relevance. The dominant evil in such business, to which various legislative bodies have addressed themselves, is mindless obscenity, something in which there is ample profit but no art, no advocacy, no social criticism, no dream of a better world. Those who hang on the pornographic periphery of the motion picture business have no communality with those whose confrontations with government have previously established constitutional benchmarks along the survey line of free speech.

The newspaper cases are historically *sui generis*, reflecting a cultural tolerance and trust distilled from centuries of experience, in England as well as America, with the role of the journalist in a democratic system of government, and their doctrine has nothing to do with the suppression of obscenity, as the Court specifically recognized in *Near v. Minnesota*, 283 U.S. 697, 716, 75 L. Ed. 1359, 1367 (1931).

Also inapplicable are the numerous permit cases which have almost invariably involved either the ordained ministers of Jehovah or labor union organizers. The thrust of those cases (e.g., *Schneider v. State*, 308 U.S. 147, 84 L. Ed. 155 [1939]; *Cantwell v. State*, 310 U.S. 296, 84 L. Ed. 1213 [1940]; *Staub v. Baxley*, 355 U.S. 313, 2 L. Ed. 2d 302 [1958])

was against ill-defined, far-ranging discretion held by the licensor. *Bantam Books v. Sullivan*, 372 U.S. 58, 9 L. Ed. 2d 584 (1963), which disabled Rhode Island's Commission to Encourage Morality in Youth, is a lineal descendant of these decisions because it was based upon the vagueness of the Commission's statutory mission and the total absence of safeguards against the suppression of nonobscene matter. By present contrast the Maryland Board in its authority not to approve a motion picture is plainly limited to films which either tend to incite to crime (a rarity) or are obscene. The State can only presume that this Court will not voluntarily declare its bankruptcy as to the libidinous by here holding that even it, hence no one, can determine what is or is not obscene in motion pictures.

If the Court is here prone to reconsider the constitutional soundness, *vel non*, of movie censorship, account must be taken of the changing character of the commercial film. What is known as the "family movie" has neared extinction, while the western and mystery have been abandoned to television. Production is sustained by increasing reliance upon and preoccupation with sex and violence. Report, New York State Joint Legislative Committee to Study the Publication and Dissemination of Offensive and Obscene Material (Legislative Document No. 77 — 1962), pp. 48, 63. This is a subject of genuine concern to intelligent men of good will. Maryland, like many other jurisdictions throughout the country (see Appendices to this and *Amici* briefs), has satisfactorily relied for almost 50 years on administrative preview of motion pictures as the principal means of preventing the display of this most perniciously memorable form of published obscenity. There is nothing in the present record to show that the Board has acted or has statutory leeway in which to act in an arbitrary, capricious or just unreasonable fashion. To hold that the system

of administrative preview of films is now, after a half century of valuable service, constitutionally unavailable in the hour of perhaps its greatest need will do nothing to advance the cause of free speech in America but will serve only to facilitate the distribution and exhibition of obscene movies.

Assuming that obscenity is identifiable and that the obscenity of any given film is an issue of law which a court may decide, that is no basis for the contention that *only* a court should make the decision that, in effect, only a judge knows an obscenity. Such an argument is patently ridiculous and needlessly impugns the whole administrative process.

On balance, therefore, the free speech right of a motion picture theater operator to uncontrolled commercial film exhibition cannot outweigh the community's interest in preventing the display and commercial exploitation of obscenity — speech beyond the pale of constitutional freedom — in its most compelling published form.

Recognizing, as did Mr. Justice Jackson in his dissent to *Kunz v. New York*, 340 U.S. 290, 308, 95 L. Ed. 280, 291 (1951), that "[t]he Court as an institution not infrequently disagrees with its former self or relies on distinctions that are not very substantial", Maryland submits that the instant appeal presents a most inappropriate occasion for such activity and urges this Court to reaffirm its stand in *Times Film v. Chicago, supra*, which affirmatively answered the pendant question of *Burstyn v. Wilson*, 343 U.S. 495, 506, 96 L. Ed. 1098, 1108 (1952), "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films".

## III.

### Appellant Has No Standing in this Appeal to Challenge the Licensing Standards of Article 66A.

Under the *Times Film* decision, the Maryland motion picture licensing statute is not void on its face. Appellant cannot, therefore, properly attack any standard of administrative review in this proceeding because, by refusing to submit "Revenge at Daybreak" for approval, he has failed to establish the case and controversy necessary to judicial consideration of such standards. As this Court indicated in *Times Film*, 365 U.S. at 50, 5 L. Ed. 2d at 408, the way to dispute standards of film review not patently unworkable is to have them applied to specific motion pictures and to appeal from any unsatisfactory application. He who would complain against standards and procedures which are not *ipso jure* defective must first show that those standards or procedures have been directly and unfairly applied against his rights in the litigation at hand. Appellant elected not to do this and he is bound in this Court by that election.

*Staub v. Baxley*, 355 U.S. 313, 2 L. Ed. 2d 302 (1958), is not contrary authority, because this Court there found that the municipal ordinance which required organizers to obtain a permit from the Mayor and Council could in no wise be constitutionally enforced because issuance lay in the uncontrolled discretion of that group. Only because the ordinance was wholly void on that account was it assailable *in toto* on review of a conviction for failure to apply for a permit.

## IV.

## The Maryland Statutory Standards for Determining What Motion Pictures Are Obscene or Tend to Incite to Crime Are Not Constitutionally Defective.

Even if the State were to concede — which it does not — that Appellant may in this proceeding challenge the licensing standards contained in Section 6 of Article 66A of the Maryland Code, those standards are not so vague and indefinite as to attract constitutional censure.

The standard for determining obscenity is stated in definitive form in subsection (b) of Section 6:

> "For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess."

This definition was enacted by Chapter 201 of the Laws of Maryland of 1955 and presumably came from the opinion of Illinois' Chief Justice Schaefer in *ACLU v. The City of Chicago*, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954), in which, after considerable review of the subject, it was stated (592):

> "We hold, therefore, that a motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person. . . ."

This definition is wholly compatible with this Court's constitutional definition enunciated in *Roth v. United States*, 354 U.S. 476, 489, 1 L. Ed. 2d 1498, 1509 (1957) —

"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest — and reaffirmed, with explanations, in *Jacobellis v. Ohio*, U.S. , 12 L. Ed. 2d 793, 800 (1964).

This Court, in *Roth*, affirmed convictions under anti-obscenity statutes considerably less precise than Section 6(b), *supra*, noting (354 U.S. 491, 1 L. Ed. 2d 1510-1511):

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' . . . These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . .'."

The first portion of subsection (c) of Section 6 is basically repetitive of subsection (b), stating:

> "For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, . . ."

This provides legislative affirmation that erotica and pornography tend to debase and corrupt morals. The observations of Illinois' Chief Justice Schaefer are again helpful (121 N.E. 2d at 592, 593):

> "So far as the term 'immoral' is concerned we think that when employed, as here, to describe a basis upon

> which to impose a prior restraint upon freedom of expression, it must be regarded as little more than a synonym for 'obscene'. Such, indeed, appears to have been the sense in which the legislative bodies used the term. . . . the term 'immoral' in the ordinance must be construed as referring to that which is immoral because it is obscene. . . ."

The remaining portion of subsection (c), which embraces a film "if it expressly or impliedly presents [acts of sexual immorality, lust or lewdness] as desirable, acceptable or proper patterns of behavior", was judicially limited but not repealed by *Kingsley Corp. v. Regents of U. of N.Y.*, 360 U.S. 684, 687, 3 L. Ed. 2d 1512, 1516 (1959), which reversed the Regents' denial of a license to "Lady Chatterly's Lover", a concededly obscenity-free film, based solely upon its alluring portrayal of adultery. The State suggests that this Court would not receive with equivalent favor a film which either advocated or alluringly portrayed pederasty, fellatio, bestiality or any other perversion in the "*crimen innominatum*" class.

Finally, subsection (d) states:

> "For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

The State does not understand this definition to be unclear, and the Appellant has addressed no part of his brief to that issue. The Maryland Court of Appeals has considered this subsection without impugning its constitutionality. In *United Artists v. Bd. of Censors*, 210 Md. 586,

**124 A. 2d 292 (1956), it held that "The Man with The Golden Arm" did not teach and advocate the use of narcotics.**

V.

**Neither the Sexless Nature of the Film Nor the Fee Chargeable for its Review Nor the Time Consumed in its Review Provides a Bar to Appellant's Conviction.**

A considerable portion of the Appellant's brief is devoted either to speculation over what would have happened if he had submitted the subject film to the Board for review or to reverie about what has happened to him in other cases. Little of this is significant and none of it is relevant, serving only to confuse the one issue genuinely in controversy — the continued effect of the *Times-Film* decision.

This resultant confusion is illustrated by the emphatic statement on page 21 of his brief that the innocence of "Revenge at Daybreak" prevents Maryland from constitutionally *suppressing* the film. This statement has no meaning because Appellant by his own calculated refusal to submit the film to the Board prevented even the possibility of suppression. He is being punished for that refusal and that refusal alone. Nothing whatever is being suppressed.

Then, the argument proceeds, even if "the crime of non-submission is an appropriate adjunct to a valid system of censorship", the innocent nature of the instant film presents a complete defense, under authority of *Ex Parte Endo*, 323 U.S. 283, 89 L. Ed. 243 (1944). But that was a habeas corpus proceeding which determined only that an American citizen of Japanese ancestry was entitled to release from detention after her loyalty had been con-

ceded by the federal government. It assumed that initial detention was authorized after evacuation. 323 U.S. at 301, 89 L. Ed. at 255. It did not hold, therefore, that the petitioner was entitled to constitutional freedom from the wartime relocation program. Without this holding, the case has no present analogistic value.

A closer analogy equates the Appellant to the cranky home owner who refuses to fill up his private well and connect to the public water system, arguing that his well water is purer than that in public pipes. The production of comparative water samples demonstrating his thesis gives him no defense to the misdemeanor of failure to connect.

Similarly, Appellant's tortured argument that the schedule of fees set forth in Section 11 of Article 66A (App. 6-7), which is based on film footage and frames per foot, constitutes a tax on free speech has no place in this appeal. No fee has been paid or tendered with reference to the subject film. And this is not a declaratory judgment procedure challenging imposition of the fee. Indeed, even if Section 11 were properly at issue, the fees there set out cannot possibly be compared to the receipts license tax struck down in *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L. Ed. 660 (1936), if only because the Maryland fees are not intended to restrict the exhibition of motion pictures. They have nothing in common with the historically "obnoxious taxes" there discussed and found companion to the tax proscribed. 297 U.S. at 248, 250-251, 80 L. Ed. 667, 669. Nor do they compare to the "flat license tax" on solicitors found offensive when applied to Jehovah's army of evangelists in *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 87 L. Ed. 1292, 1298 (1943).

Nor is any soundness added to Appellant's argument by the contention that the results of the Board's existence and activity, in terms of the number of films denied approval, are "indefensibly disproportionate" to the costs of administration. First, the contention itself is irrelevant to consideration of the reasonableness of the fee charged, because that reasonableness is subject to review only in terms of its relationship, in gross proceeds, to the Board's operating expenses, and not to results of any kind. The fee would not be unreasonable if all films were licensed as submitted. Second, the statistical measurement used by Appellant is not reliable as an indicator of the result desired. The number of modifications ordered and licenses refused does not take into account the films which were not submitted for review simply because their distributors knew them to be obscene and hence not entitled to be licensed.

An additional confusion *vice* contention is Appellant's proposition that, since the Board may take more than a day to process a film, the Maryland review system causes unwarranted delay in the exercise of free speech. This is an absurd notion. The Appellant is well aware that there is in fact no delay in exhibition unless the film is not licensable, that most films are presented well in advance of their showing dates and, if approved, are cleared within 24 hours. Even if it were the practice of the Board rigidly to require compliance with Rule 4 (Def. Ex. No. 1; R. 13, 57) and to hold films a full 48 hours after delivery, there would be no delay of the sort necessary to demonstrate constitutional unreasonableness. It is noteworthy that, although Appellant has raised the issue of delay, he has nowhere attacked the fairness or orderliness of the Board's administrative procedures, finding fault in

them only because they lack identity with those favorably reviewed in *Kingsley Books v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469 (1957).

Finally, the State challenges as manifestly unwarranted Appellant's statement that *as a matter of fact* the Maryland Board will not "recognize the innocence of each unobjectionable film it processes" but, rather, "tends to censor". There is no basis in this or any other record for such an assertion. It is *ad hominem* argument beyond the indulgent limits of appellate advocacy. It is gratuitously disrespectful of the integrity of the members of the Maryland Board, each of whom is trying earnestly to perform the duties of public office, as prescribed by the legislature and interpreted by the judiciary, to the best of his ability.

## CONCLUSION

For the reasons stated, the judgment of the Court of Appeals of Maryland affirming Appellant's conviction by the Criminal Court of Baltimore should be affirmed.

Respectfully submitted,

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# APPENDIX

In addition to the localities listed in the Appendix to the Brief of American Civil Liberties Union and Maryland Chapter, ACLU, *Amici Curiae*, there appear to be film review boards or authorities in the following municipalities (The Film Daily 1964 Year Book of Motion Pictures, 703-706 [New York, 1964]):

Bellingham, Washington
Bessemer, Alabama
Chester, South Carolina
Geneva, Illinois
Glendale, California
Milwaukee, Wisconsin
Port Arthur, Texas
San Jose, California
Tampa, Florida
Valdosta, Georgia
Waterloo, Iowa.